UNITED STATES COURT OF APPEALS

495935

FOR THE EIGHTH CIRCUIT

No. 94-3047MNST

RICHARD VAN BERGEN,
Appellant,

v.

THE STATE OF MINNESOTA, ET AL,
Appellee.

Appeal From Order And Judgment Of The
United States District Court
For The District Of Minnesota

APPELLANT'S BRIEF AND ADDENDUM

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellant requests a hearing to present a fifteen minute oral argument to summarize and update his case. This case involves controversial restrictions on the use of automatic telephone dialing equipment. Similar facts and issues have recently been considered and resolved in favor of plaintiffs in other jurisdictions including ***Lysaght v. State of New Jersey***, 837 F.Supp 646, (D.N.J. 1993), ***Moser v. FCC***, 826 F.Supp. 360, (D.Or. 1993) and ***Moser v. Frohnmeyer***, 845 P.2d. 1284. The only Minnesota case dealing with these issues is ***State of Minnesota v. Casino Marketing Group, Inc.***, 491 N.W.2d 882. That case is presently being reviewed by the Minnesota Court Of Appeals, File No: C9-94-1268. The issues in these cases have been resolved primarily through analysis of ***City of Cincinnati v. Discovery Network, Inc.***, 113 S.Ct. 1505, (1993), and ***Edenfield v. Fane***, 113 S.Ct. 1792, 123 L.Ed.2d 543, (1993).

A significant distinguishing fact in this case is that the Plaintiff seeks protection of his right to free "political" speech, including his right to receive political information and to speak his views. All of the above cases deal with "commercial" rather than "noncommercial" political speech and the decisions express that a more relaxed test applies in determining the appropriateness of restrictions on "commercial" speech. Since the Plaintiff here seeks protection of his political free speech rights, he is entitled to a higher degree of scrutiny and greater protection than that afforded in ***Edenfield***, ***Discovery Network***, and the other recent "commercial" speech cases.

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PRELIMINARY STATEMENT

This case was heard and decided by the Honorable Judge Richard H. Kyle in United States District Court for the District Of Minnesota, Third Division, on July 18, 1994.

Plaintiff's Complaint, (App. 9), filed June 17, 1994, was brought for declaratory and injunctive relief under 28 U.S.C. Secs. 1331 and 2201 based upon a federal question as to the constitutionality and enforceability of Minn.Stats.Secs. 325E.26 through 325E.31, as amended effective July 1, 1994. Those Statutes, as amended and by the interpretation threatened to be enforced by the Minnesota Attorney General, blocked the Plaintiff from using automatic telephone dialing equipment to communicate a one minute prerecorded political message to voters during his campaign for governor of the state. Plaintiff challenged the threatened enforcement by bringing his action for declaratory and injunctive relief on constitutional grounds.

Appellate Court review is sought based upon its jurisdiction over final decisions rendered by the District Courts, 28 U.S.C. Sec. 1291. Appellant also seeks Supplemental Jurisdiction pursuant to 28 U.S.C. Sec. 1367 in connection with the same underlying facts and the application of certain provisions of the Minnesota Constitution. Judge Kyle issued his final decision, with prejudice in the case on July 18, 1994, filed the same day, (Add. 1). Appellant's Notice of Appeal was received and filed by the Clerk, U.S. District Court on August 16, 1994 and the appeal was docketed by the Clerk, U.S. Court of Appeals on August 17, 1994.

STATEMENT OF ISSUES

The Plaintiff appeals his case for consideration of the following issues:

A. **Whether Minnesota Statutes, Secs. 325E.26 through 325E.31, or the Minnesota Attorney General's threatened enforcement thereof, abridge the Plaintiff's First Amendment freedom of speech and his Fourteenth Amendment due process rights under the United States Constitution.**

Standard Of Review: De novo review. Trial Court's failure to rule on the inadmissibility of evidence is clear error.

Most Relevant Cases: ***United States v. O'Brien***, 391 U.S. 367; ***Edenfield v. Fane***, 113 S.Ct. 1792; ***City of Cincinnati v. Discovery Network, Inc.***, 113 S.Ct. 1505; ***State of Minn. v. Casino Mktg. Grp.***, 491 N.W.2d 882.

Relevant Constitutional And Statutory Provisions:

U.S. Constitution, First Amendment, Freedom of Speech

U.S. Constitution, Fourteenth Amendment, Due Process

Minn.Stats.Secs. 325E.26-31: Laws 1987, Ch. 294, Secs. 1 to 6; Laws 1994, Ch. 534, Art. II, Sec. 1.

B. **Whether the same Minnesota Statutes, or the Minnesota Attorney General's threatened enforcement thereof, violate the Plaintiff's Fourteenth Amendment equal protection rights under the United States Constitution.**

Standard Of Review: De novo review. Trial Court's failure to rule on the inadmissibility of evidence is clear error.

Most Relevant Cases: ***Erznoznik v. City of Jacksonville***, 422 U.S. 205; ***Auburn Police Union v. Tierney***, 756 F.Supp. 610; ***Police Dept fo Chicago v. Mosley***, 408 U.S. 92; ***First Natl. Bk. of Boston v. Bellotti***, 534 U.S. 765.

Relevant Constitutional And Statutory Provisions:

U.S. Constitution, Fourteenth Amendment, Equal Protection

Minn.Stats.Secs. 325E.26-31, Id.

C. Whether the same Minnesota Statutes are preempted by federal law.

Standard Of Review: De novo review. Trial Court's failure to rule on the inadmissibility of evidence is clear error.

Most Relevant Cases: ***Calif. Fed. Savings and Loan Ass'n. v. Guerra***, 479 U.S. 272; ***Meyer v. Intl. Playtex, Inc.***, 724 F.Supp. 288.

Relevant Constitutional And Statutory Provisions:

Minn.Stats.Secs. 325E.26-31, Id.

Federal Telephone Consumer Protection Act, 47 U.S.C. Sec. 227

STATEMENT OF THE CASE

In June 1994 the Plaintiff discovered that an obscure amendment to ***Minn.Stats.Secs. 325E.26-31***, (at App. 45), would be interpreted and enforced by the Minnesota Attorney General to block Plaintiff's campaign for governor of the state. Up to July 1, 1994, ***Minn.Stats.Secs. 325E.26-31***, (at App. 44), regulated the transmission of prerecorded "commercial" messages by way of automatic telephone dialing devices, (***Casino Marketing***, Id.). Such devices are known as "Automatic Dialing-Announcing Devices" and are referred to in the industry as "ADAD's". The new law, effective July 1, 1994, amended ***Minn.Stat.Sec. 325E.26*** to expand the definition of the term "Message" to mean "any call, regardless of its content". According to the Attorney General, the amendment prohibited those persons not falling into the statutes exceptions, from delivering any prerecorded ADAD messages unless the telephone subscriber "knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message", or the message was "immediately preceded by a live operator" obtaining consent before delivering the prerecorded message, (***Vallenti Aff.***, App. 28-29).

The Plaintiff planned an ADAD campaign when he announced his candidacy for governor in December 1993, (***Van Bergen Aff.***, App. 20, 63). He substantially prepared his campaign before July 1994, (***Van Bergen Aff.***, App. 62). The Plaintiff could not obtain the specialized equipment or trained staff to modify his ADAD campaign to comply with the unreasonable restrictions threatened by the Attorney General, (***Van Bergen Aff.***, App. 62-63). The Attorney

General's interpretation and threatened enforcement effectively eliminated the Plaintiff's campaign and he lost the primary election bid for the Democratic party's nomination.

The Plaintiff is a Democrat and a supporter of Lyndon LaRoche, (***Van Bergen Aff.***, App. 64). The Attorney General, Mr. Humphrey, is a Democrat who has publicly stated his intentions to eliminate the "LaRouche" supporters from the Democratic party, (***Humphrey Ltr.***, App. 65-66; ***Van Bergen Aff.***, App. 63-64). The Attorney General has used his public office to suppress the political views of LaRouche supporters, including those of the Plaintiff.

With the hope of saving his campaign, the Plaintiff filed his Summons, Verified Complaint, (at App. 8), Application for Temporary Restraining Order, Supporting Memoranda of Law, and Supporting Affidavits and Exhibits with a Proposed Order, on June 28, 1994 seeking to have the statutes declared unconstitutional and to enjoin enforcement.

On July 5, 1994, the District Court Judge heard arguments on Plaintiff's request for a Temporary Restraining Order and denied the request. The Trial Judge then set a briefing schedule and trial date of July 12, 1994. In connection with the trial the Plaintiff served a trial subpoena on Mr. Humphrey and objected to the hearsay affidavit testimony submitted by the Defendants. The Defendants moved to quash the subpoena and the Trial Judge granted that motion, (at Add. 25-26). The Trial Judge did not rule on the Plaintiff's admissibility and hearsay objections to the Defendants' affidavits.

At trial and by his briefs the Plaintiff argued that the

Minnesota statute amendment was passed without due process in violation of the due process standards prescribed by the Minnesota Constitution; that the law and the Attorney General's threatened enforcement abridged the Plaintiff's freedom of speech including his right to receive information and to speak his views; that the law violates the Plaintiff's right to equal protection because it permits excepted classes of persons to use ADAD's on an unrestricted basis; that the Minnesota statutes are preempted by federal law; and other related arguments.

The Trial Judge issued and filed his final decision against the Plaintiff with prejudice on July 18, 1994, (at Add. 1).

STATEMENT OF FACTS

A. Automatic Telephone Dialing Equipment.

There are two types of automatic dialing computers in use today. One type is the ADAD which dials a telephone number, and if a person answers the telephone, it plays a prerecorded message. The other type is known as a "predictive dialer" that also dials a telephone number automatically. However, when a person answers the telephone the predictive dialer switches the call to a person, who may deliver the same message given by the ADAD, in the person's own voice or by introducing a pre-recorded message. (See ***Verified Complaint***, App. 10, and ***Bergmann Aff.*** attaching ***Kolker Affs.***, App. 36)

Historically, ADAD's have experienced some problems that have caused them to be unpopular with the general public, (***Kolker Aff.***, App. 37-39). For example, in the past some ADAD's failed to

recognize the "click" of the recipient hanging up the telephone, thus tying up the recipient's telephone line for a significant length of time. Technological advances have largely eliminated the problems. (See discussion in the Opinion of ***Lysaght*** at pps. 3-4 of ***Bergmann Aff., Exhibit IV***; and supporting ***Kolker Affs., Berg.Aff., Exhibits I and II***, App. 39.)

B. Regulatory Statutes.

The passage of the Federal Telephone Consumer Protection Act, (referred to herein as the "TCPA"), 47 U.S.C. Sec. 227, and similar state laws were prompted by the above mentioned problems.

The Minnesota Statutes, prior to July 1, 1994, prohibited certain persons from delivering a recorded commercial message by way of ADAD equipment, unless the message was introduced by a live operator, or the receipt of the message was knowingly or voluntarily requested, consented to, permitted, or authorized by the listener. (See ***Minn.Stats., Secs. 325E.26 and 325E.27***, App. 44-45; and see ***State of Minnesota, by Humphrey v. Casino Marketing Group, Inc.***, 491 N.W.2d 882, 886 prg. 2, for interpretive case law stating the uncontested subject area of the statute as "commercial telephone solicitation".)

As of July 1, 1994, the Minnesota ADAD statutes were amended by adding 325E.26, Subdivision 6, (at App. 45). The added subdivision states: "MESSAGE. "Message" means any call, regardless of its content." The Minnesota legislative history shows that this amendment was intended as no more than a "housekeeping" detail, (***Valenti Aff.***, App. 26), and a "merely technical change", (***Valenti Aff.***, App. 27). There is no

legislative history documenting a purpose to protect residential privacy, the public safety, or business commerce. Those purposes were assigned at the convenience of the Attorney General in this case and are not consistent with the purposes the Defendants argued in ***Casino Marketing***, where they added the alleged purpose of protecting the public against consumer fraud. The Defendants did not introduce any legislative history in this case. The Attorney General interpreted the amendment to expand the restrictions on ADAD's to include the political information and views of the Plaintiff and to prevent him, or any other member of the public from receiving similarly transmitted information from certain excluded persons, (***Complaint***, App. 11, 13).

The Minnesota ADAD statutes specifically allow certain persons, organizations, and classes of persons to use ADAD's to transmit the identical type of message intended by the Plaintiff in this case. The statutes do not restrict any commercial or noncommercial: (1) messages from school districts to students, parents, or employees, (2) messages from callers who have a current business or personal relationship with a listener, or (3) messages advising employees of work schedules. (See ***Minn.Stat., Sec. 325E.27***, App. 44; and see interpretive case law at ***Humphrey v. Casino Marketing***, Id. at p. 886 prg. 3.)

The Minnesota ADAD statutes also specifically exempt any ADAD calls by all organizations listed in ***Minn.Stat., Sec. 290.21, Subd. 3, Clauses (a) to (e)***. (See ***Minn.Stat., Sec. 325E.26, Subd. 4***, last sentence, at App. 44.) Those organizations include: the State of Minnesota and its political subdivisions; all entities operating exclusively for religious, charitable, public cemetery,

scientific, literary, artistic, or educational purposes, or for the prevention of cruelty to children or animals; all entities operating under a lodge system carrying on substantially all of their activities within this state; all war veteran organizations within this state; and the United States of America. (See ***Minn.Stats., Sec. 290.21, Subd. 3(a) to 3(e).***)

C. The Plaintiff's ADAD Campaign Preparations.

The Plaintiff in this case announced his candidacy for the office of governor of the State of Minnesota on December 14, 1994. On July 5, 1994, the Plaintiff, and his running mate Glenn Mesaros, registered with the Minnesota Secretary of State as DFL candidates for governor and lieutenant governor in the September 13, 1994 primary election. (***Van Bergen Aff.***, App. 20, 61; ***Mesaros Aff.***, App. 70.) The Plaintiff planned and prepared to deliver his campaign using ADAD's technology in compliance with the Minnesota ADAD's statutes, (***Van Bergen Aff.***, App. 21, 62). The Plaintiff prepared a recorded informational campaign message consisting of a one minute announcement. The message identifies Mr. Van Bergen, announces his candidacy, encourages people to vote in the primary, and provides a toll free phone number for listeners to request free information, (Id., App. 62). The message does not solicit any contribution or purchase of any kind. The Plaintiff obtained twelve reserved phone lines; the ADAD system was programmed to block hospital, public service, emergency, and known commercial block numbers; the ADAD system was installed and tested; a voice-mail line was reserved for return phone calls; other necessary facilities and support were arranged for immediate

operation, (**Id.**, App. 62).

The Plaintiff planned and prepared to use ADAD equipment as the essential means of delivering his campaign to the public, (**Id.**, App. 21-22). The Plaintiff did not have adequate time to change his campaign, (**Id.**, App. 62-63). Necessary equipment and trained staff were not available. Consequently, the use of ADAD's was absolutely necessary to the delivery of his political messages and an effective campaign.

On June 22, 1994, at the request of Plaintiff's counsel, Philip F. Valenti, an investigative journalist, contacted the State's Attorney General's Office to determine the Attorney General's intention as to enforcement of the amended statute. Mr. Valenti spoke to a representative of the Attorney General's Consumer Division, Citizen Assistance Center, who said that the Amendment will expand the law after July 1, 1994 to make all calls made by [restricted] persons "illegal", unless they meet the Statute's prior conditions, (ie: advance consent of the listener, or the introduction of the message by a live operator). Mr. Valenti referred the representative to an example of a noncommercial message currently being communicated by Lewis du Pont Smith using ADAD's. The representative stated that the message and its manner of communication will be "illegal" after July 1, 1994, (see ***Valenti Aff.***, App. 28-29) Mr. Valenti then contacted Andrew Schriner, Assistant To The Attorney General. Referring to his prior call and to the Lewis du Pont Smith message, Mr. Valenti asked Mr. Schriner about the status of that ADAD communication. Mr. Schriner confirmed the Attorney General Office's policy that such noncommercial messages will be illegal

after July 1, 1994. (See ***Valenti Aff.***, App. 29.)

To comply with the Attorney General's interpretation and threatened enforcement the Plaintiff would have been required to introduce his message by live operators, which would have required the immediate provision of a trained staff to attend 12 phone lines 12 hours per day, and the purchase of a "Predictive Dialer", (an automatic dialer that allows a live operator to introduce a message), (***Van Bergen Aff.***, App. 62-63). It was impossible for the Plaintiff to implement the changes and still run a campaign during the short period available from July 18, 1994, the date of the final decision, to September 13, 1994, the date of the primary election. The Plaintiff could not locate a "Predictive Dialer", or obtain one and program and test it, or train a staff within the campaign period, (Id., App. 62-63).

Based on statistics obtained from persons who operated an ADAD system to deliver a political message by Lewis du Pont Smith, 885,000, [Note: Figures are rounded to the nearest 1000], people were contacted directly, and 415,000 people stayed on the line to listen to the entire message. 6,000 people have asked for additional information. A substantial number of listeners attended informational meetings. A large number of listeners called to submit their documented complaints regarding the Attorney General and his office. (See ***Vallenti Aff.***, App. 68.) The statistics show a genuine public interest in accepting prerecorded calls having an informational rather than a commercial purpose. The Plaintiff reasonably expected equal or greater public interest in his message.

D. The Evidence.

The Plaintiff provided the expert opinion testimony by submission of the 1993 and 1992 affidavits of Mr. Kolker, (***Kolker Affs.***, App. 36-43), which were reviewed and reaffirmed by him as of July 1994, (***Kolker Aff.***, App. 74). The affidavits of Mr. Van Bergen and Mr. Valenti were provided based on their own personal knowledge and information, (***Van Bergen Affs.***, App. 20, 61; ***Vallenti Affs.***, App. 24, 67, 79). The personal testimonials of many citizens who had received other ADAD informational messages and considered them to be a valuable public service were submitted on behalf of the Plaintiff, (see affs, App. 67-73).

The Defendants have the burden of proof in this case. The Defendants did not produce any contradictory expert or admissible first hand testimony. The Defendants did not refute the ulterior motives of the Attorney General in enforcing the revised statutes selectively. On the letterhead of the Attorney General's Office for the State of Minnesota, Mr. Humphrey has sought to use his office for the political purpose of eliminating LaRouche supporters, (***Humphrey Ltr.***, App. 65).

The Defendants claimed that their broad interpretation of the amended ADAD statutes serves the public safety, residential privacy and business commerce. Legislative history does not support that claimed purpose, and the Defendants used a different explanation of the statutes' purpose in ***Casino Marketing***. Aside from that, in this case the Defendants did not provide any admissible evidence of a single instance of harm, a first hand complaint of an actual invasion of residential privacy, or a claim of an actual disruption of business or commerce by an ADAD

delivering a prerecorded informational message.

At trial and by way of ***Plaintiffs' Reply Brief*** dated July 8, 1994, the Plaintiff objected to the Defendants affidavit testimony. The Trial Court did not rule on Plaintiff's objection.

The Plaintiff offered all of the following objections to the Trial Court as to the inadmissibility and inadequacy of the Defendants' affidavits, (***Plts.Rply.Brf.***, Dated July 8, 1994).

The affidavits produced by the Defendants are based on hearsay and speculation to create alarm about hypothetical possibilities.

Some of the affiants are not even identifiable, could not be located and must be thrown out because they could not be subjected to cross examination or verification. The ***Lokke Affidavit***, (at App. 50), does not provide a phone number or address where she could be reached to verify her statement, or served with a subpoena for appearance at trial and cross-examination. Her affidavit is vague. It does not state the message given, whether it was commercial or noncommercial, the length of the message, whether there actually was a life threatening situation, whether she properly hung-up the phone or panicked due to her circumstances, why she did not call 911 instead of trying to call her husband to discuss whether or not to "arrange a meeting with [the] doctor", and whether or not she had any other similar calls.

All of the Defendants' affiants, with the exception of Ms. Lokke, are employees of businesses and service organizations, and are not complaining about calls to private residences, (***LeBlanc Aff.***, App. 46; ***Berkland Aff.***, App. 52; ***Timian Aff.***, App. 54; ***Holt Aff.***, App. 56; ***Pichotta Aff.***, App. 58; ***Humbert Aff.***, App. 59).

The Defendants did not produce any admissible or first hand evidence of a single incident of an invasion of residential privacy. None of the employe affiants state that they have authorization to speak for the corporate or organizational entity named in their affidavit. It is unlikely that a receptionist trainee such as Ms. Holt would have such authority.

None of the affiants state the length of the messages complained of or the actual time to disconnect. Research with U.S. West shows that calls automatically disconnect in 10 seconds or less no matter which party hangs up the phone, and even when an ADAD or other dialing equipment is used, (**Vallenti Aff.**, App. 80).

None of the Defendants' affiants say they filed a complaint with the Attorney General's Office, or that their employer did.

None of the affidavits state that ADAD calls are an invasion of privacy or that they should be banned, as alleged by the Defendants.

All of the affidavits express a fear and speculation about what could happen rather than what did happen. For example:

Berkland Affidavit, App. 52. The Berkland statement refers to "concerns of the medical staff that a patient experiencing an emergency situation may not be able to call into the doctor's office". It does not say that any patient did have trouble calling in. In fact, Mr. Berkland has since explained that none of the center's patients made a complaint that could be related to an ADAD call, or about any actual difficulty getting through to the center in an emergency. Mr. Berkland pointed out that patients usually call 911 in a real emergency rather than their doctor's office. Mr. Berkland has also explained that he has no

idea whether the calls came in simultaneously or one at a time. If the calls came in one at a time they tied up only one phone line at a time. Mr. Berkland did not observe any actual situation involving ADADs calls because none of the calls occurred at his office building which is located at 333 Excelsior Blvd., Suite 175, Minneapolis, Minnesota 55416. The calls allegedly complained of occurred at 5000 West 39th Street in St. Louis Park. Mr. Berkland does not state the length of the message or actual time to disconnect a call.

Timian Affidavit, App. 54. Mr. Timian states that the alleged ADAD calls "may prevent clients in emergency situations from reaching our agency and obtaining the emergency assistance they need". He does not say that the lines actually were tied up, or whether they came in one at a time. He does not say whether any client complained about getting a busy signal or had any trouble getting through. Mr. Berkland's observation that the relied upon emergency number is 911, (not United Way), applies here. Mr. Timian does not state what message was received by the calls, their length or the time to disconnect.

Holt Affidavit, App. 56. Undoubtedly, as a receptionist handling incoming calls, Ms. Holt becomes frustrated whenever she receives a number of calls. She does not state how many calls were received, the length of the message or the time to disconnect. She does not complain about an invasion of residential privacy. She does not identify any actual loss or harm to the business.

Pichotta Affidavit, App. 58. Ms. Pichotta states that she has received only one recorded phone call. She does not complain

about any actual harm or loss caused by the call. She does not even complain about receiving the call. She does not state the length of the message or the time necessary to disconnect.

Humbert Affidavit, App. 59. Ms. Humbert says that recorded calls were disruptive to her but she does not state how they disrupted the business of her employer. She says that the calls "may have prevented incoming calls". She does not state the length of the message, but presumably the disconnect time was instantaneous on each of the first two calls. The disconnect time for the third call is not stated.

LeBlanc Affidavit, App. 46. This affidavit relates solely to commercial telephone calls placed to phone lines at Abbott Northwestern Hospital. The affidavit is based on hearsay that is at least twice removed from the alleged first hand complainant. Mr. LeBlanc states that telemarketing calls were placed to patients in the intensive care units and coronary care units who are gravely ill. He says that "annoying calls could endanger [patient] well being but he does not state how, or whether anyone's well being actually was put in a threatened situation. He does not state the length of the messages or the time to disconnect. When contacted Mr. LeBlanc stated that he is not aware of any actual harm or loss to a patient resulting from a recorded phone call. He said he is not aware that the hospital has ever had a problem with noncommercial calls, and he did not know whether calls go directly to patients in the intensive care units or are screened by a nurse.

In fact, the affidavit of Janine Olson, (at App. 81), a nurse in the cardiovascular (coronary) intensive care unit at Abbott

Northwestern Hospital, who has more than 11 years of first hand experience in Abbott's ICU and coronary care, states that all incoming patient calls are screened first by the desk receptionist and second by the nurse who is in attendance in the patient's room. Contrary to Mr. LeBlanc's hearsay testimony, (at App. 46), Ms. Olson stated that phones in ICU are not connected to a patient's bedside. When an incoming call is received for a patient the nurse answers the room phone, which is only accessible to the attending nurse. Every call is screened to make sure it is from a relative authorized to call the patient. Then, if a patient can receive the call, she "plugs in" a phone unit for the patient and monitors them during the call. Further, she states that phone calls do not distract from her first priority of patient care, and that the "ring" is insignificant compared with the constant "alarms" triggered by patient monitors. She says that there is normally constant noise and activity in ICU, that patients are sedated and their rest is not disturbed by the noise. Ms. Olson says that she does not recall any problem with recorded calls at any time in her experience at Abbott over the past 11 years.

Loewe Affidavits. These affidavits are based on hearsay that is at least three times removed from an alleged complainant. Mr. Loewe's affidavits were withdrawn by the Defendants.

The Trial Court did not rule on the above objections by the Plaintiff as provided by Plaintiff's Reply Brief of July 8, 1994. Plaintiff reasserted his objections at the trial.

Contrary to the hearsay affidavit statements, all

of the affiants, [this includes every affiant alleged to be a complainant, except Ms. Kokke], who were contacted by Plaintiff's investigator, Mr. Valenti, stated that the message they referred to was an ADAD message delivered by Lewis du Pont Smith, (***Vallenti Aff.***, App. 79). Mr. Valenti's first hand familiarity with the ADAD transmission of that message shows that the message is one minute in length; that calls are disconnected within 10 seconds, and that U.S. West's programmed equipment assures a disconnect within 10 seconds even if only one party hangs up; that the ADAD can only call one line at a time; and that the ADAD does not call the same number after it is answered one time, (***Vallenti Affs.***, App. 67-69, 80). The Defendants did not provide any first hand or expert testimony to contradict these facts. Nor did the hearsay testimony offered by Defendants' affidavits contradict these facts. Those affidavits merely speculate as to contrary facts and offer conjecture as to possible harm that could occur if a contrary set of facts did exist.

ARGUMENT SUMMARY

The revised Minnesota statutory scheme, as it has been interpreted by the State's Attorney General, is far broader than the TCPA, the New Jersey or the Oregon statutes because of its threatened application to both commercial and noncommercial speech. Both the original and the amended Minnesota ADAD Statutes violate the First and Fourteenth Amendments to the U.S. Constitution, as well as Article I, Section 3 of the Restructured Minnesota Constitution. The Minnesota Statutes do not meet any of

the elements of the test in ***United States v. O'Brien***. First, the Statutes were not within the due process standards set by the Minnesota Constitution for the enactment of a Minnesota law. The federal courts may not have authority to arbitrarily define and set due process standards for a state, but when a state defines its own due process standard the federal courts must enforce it under the Fourteenth Amendment. Applying Minnesota's anti-logrolling provisions of its constitution, the Minnesota legislature did not have the authority to enact the ADAD Statute Amendment. Second, the ADAD regulations do not further an important or substantial purpose. The Defendants had the burden to proof the legislative purpose in this case. Both the ***Discovery Network*** and ***Edenfield*** decisions discuss the importance of looking to the original enactment purpose and not the purpose later supplanted by an official. The legislative history provided by the Plaintiff shows that the purpose of the amendment was to add a mere "technical change" for "housekeeping" purposes. The apparent purpose on the face of the original statute, and as decided in ***Casino Marketing*** was to regulate "commercial telephone solicitation". The Defendants did not rebut Plaintiff's proof of the legislative purposes, but simply assigned their own purpose. Also, under ***Edenfield***, the Court made it clear that telephone calls made for any legitimate purpose do not impinge upon privacy because the caller can simply hangup on any unwanted call. The affidavits that were submitted by the Defendants consist of irrelevant hearsay. Those affidavits are speculative at best, and are completely refuted by first hand testimony, (ie: compare the ***LeBlanc Affidavit*** with the ***J.Olson Affidavit*** concerning any

telephone calls to the Abbott Northwestern Hospital Intensive Care and Coronary Care Units). Third, the Defendants' interests in the ADAD Statutes or their amendment are not unrelated to the suppression of free speech because they are content based. The Statutes exempt certain messages at ***Sec. 325E.27*** and certain persons and organizations at ***Sec. 325E.26, Subd. 4.*** Also, the Defendant Attorney General has expressed an ulterior motive for the suppression of the Plaintiff's political views. Evidence of those motives was not refuted by the Defendants and Mr. Humphrey refused to appear at trial pursuant to Plaintiff's subpoena. The fourth criteria under ***O'Brien*** is that the restrictions must be no greater than is essential to the furtherance of the legitimate substantial interest. Here, the analysis of ***Moser*** and ***Lysaght***, as they examine ***Discovery Network*** and ***Edenfield*** are insightful in connection with restrictions on the use of ADAD equipment. Those cases show that there is not a reasonable fit between the Minnesota Statutes and the purported privacy, safety, or business commerce interests. ADAD calls make up a very small number of unsolicited telephone calls, (ie: less than 3%, see ***Kolker Aff.***, App. 42-43). ADAD calls made by the exempt organizations pose the identical speculative threat to privacy, safety and commerce. There is no reasonable distinction between unsolicited "live" operator calls and "recorded" messages. Both have an equal effect on privacy, safety and commerce. Also, all of the Defendants' affidavits, except the Kokker affidavit, deal with commercial environments and not residential privacy. Last on this argument, the Statutes are an unreasonable prior restraint and fail the test on that basis.

The federal TCPA also preempts the Minnesota statutes because it only allows states to impose intrastate regulations regarding ADAD's. The Minnesota statutes are not limited to intrastate ADAD calls and are a prior restraint of the Plaintiff's asserted right to receive interstate ADAD communicated view points as well as to speak his own views.

The Minnesota statutory amendment is also unconstitutional under the U.S. Constitution's Fourteenth Amendment Equal Protection and Due Process Clauses because it was passed, and will be enforced in a discriminating manner, in violation of the due process safeguards Article 4, Section 17 of the Restructured Minnesota Constitution.

ARGUMENT

A. The Minnesota ADAD Statutes, And The Minnesota Attorney General's Threatened Enforcement Thereof, Violate The First And Fourteenth Amendments To The U.S. Constitution.

The right to free speech is guaranteed by the First Amendment and is protected from invasion by the states under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, (*Schwanke v. Utecht*, 233 Minn. 434, 47 N.W.2d 99; *Dunne v. U.S.*, 138 F.2d 137, (8th Cir. 1943)). The Minnesota Constitution, Article I, Section 3, separately affords the same guaranty of free speech, and is applicable under the Equal Protection Clause of the Fourteenth Amendment.

1. Plaintiff's Expression Of Political Ideas Is Noncommercial Speech And His Use Of ADAD Equipment Is Protected From The Minnesota ADAD Statutes Under The Test Applied In United States v. O'Brien.

In ***United States v. O'Brien***, 391 U.S. 367, the Supreme Court set forth the four-part test that must be satisfied before a government can justify limitations on First Amendment freedoms:

> "We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the futherance of that interest."

The burden is on the Defendants to establish the necessity of depriving Plaintiff of his free speech interest, (***Elrod v. Burns***, 427 U.S. 347). Because First Amendment rights are fundamental their deprivation requires the showing of a "substantial" state interest, and is subject to a strict scrutiny analysis, (***Carey v. Brown***, 447 U.S. 455).

a. *The Amended Statutes Are Not Within The Constitutional Power Of The State Of Minnesota.*

The ADAD Statute Amendment violates the due process "logrolling" provisions of the Minnesota Constitution, and it is not "within the constitutional power of the government" as required by the ***O'Brien*** test. The Defendants have not shown any facts to refute the violative manner in which the statutory amendment was passed.

The Minnesota Constitution defines a due process standard which the Minnesota Legislature must comply with in order to pass

any law, including any law restraining free speech. The Plaintiff is entitled to federal protection of such a due process standard as guaranteed by the Fourteenth Amendment due process and equal protection clauses.

MinMinn.Const., Article 4, Section 17, entitled, "***Laws to embrace only one subject***", states:

> "Sec. 17. No law shall embrace more than one subject, which shall be expressed in its title."

An Act that embraces two or more dissimilar and discordant subjects which could not reasonably be said to have any legitimate connection violates the constitution's due process requirements. (***City of Duluth v. Cerveny***, 1945, 218 Minn. 511, 16 NW2d 779.) It has been long established in Minnesota that where a statute title carves out a part of a general subject, legislation under such title must be confined within the same limits, and all provisions of an act outside those limits are unconstitutional. (***Watkins v. Bigelow***, 1904, 93 Minn. 210, 100 NW 1104.)

The Title to the Act, H.F. 2143, states its subject as 'amending Minnesota Statutes 1992 relating to telecommunications regulating competitive telephone services and incentive plans, making technical changes for certain regulatory provisions'. The Senate amended the Act to include the revision to ***Minn.Stat., Sec. 325E.26***, which has nothing to do with the 'regulation of competitive telephone services and incentive plans relating to telecommunications'. In fact, the amendment embraces a whole new subject area that was concealed from the Title of the Act. ***Minn.Stat., Sec. 325E.26*** restricts the use of ADAD's for commercial telephone solicitation. According to the Attorney

General, the amendment broadens the statute to restrict protected areas of noncommercial speech, and imposes those restrictions on certain individuals while exempting others.

The legislative history records that there was no discussion of the purpose or effect of the amendment, and that the subject of the amendment was not described by the Title of the Act. (See ***Valenti Aff.***) These facts were not refuted by the Defendants.

Case examples illustrate the interpretation of the constitutional provision as it applies here. In ***State ex rel. Finnegan v. Burt***, 1948, 225 Minn. 86, 29 NW2d 655, the court found that Section 8 of Laws 1945, ch. 607, relating to the demotion and discharge of employees was invalid because it was separate and distinct from the title which stated, "An act to establish a classification and salary system *** creating a classification and salary commission *** [and] fixing salaries and sums to be appropriated *** therfore".

The situation presented by this case is exactly the type of situation that Article 4, Section 17 was intended to protect against. Section 17 is intended to prevent "fraudulent insertion" of matters wholly unrelated to a bill's primary subject, and it is required that all matters in the bill be "germane" to one general subject. (***Metropolitan Sports Facilities Com'n v. County of Hennepin***, 1991, 478 NW2d 487.) The function of the Section 17 requirement that the subject be stated in the title is to provide notice of the interests likely to be affected by the law and to prevent surprise and fraud on the people and the legislature by including provisions in a bill whose title gives no intimation of the nature of the proposed legislation. (***Wass v. Anderson***, 1977,

312 Minn. 394, 252 N.W.2d 131.) The function of Section 17's related requirement that only one subject be expressed in the title is to prevent the title from being made a cloak or artifice to distract attention from the substance of the act. (***Wass***, Id.)

It is granted that the constitutional provision was not intended to prevent comprehensive legislation, but rather the combination of different and disconnected topics that are not logically related. House Bill H.F. 2143 was introduced for the purpose of adopting comprehensive legislation related to the subject of regulating competitive telephone services and incentive plans. The amendment added by the Senate regulates the use of ADAD equipment by certain persons and effectively imposes a prior restraint on protected areas of free speech. Given its effect on such a vital part of the guaranteed rights of its citizens, the subject should have been identified for public and legislative debate. The need for invalidating the amendment is demonstrated by the fact that the purpose and effect of the amendment were not mentioned when it was introduced, and there was no legislative discussion as to the amendments significant infringement of fundamental constitutional guarantees. In good conscience the legislature surely would have debated the amendment if it had recognized the subject area it impacts.

b. ***The Defendants' Interpretation Of The Amendment Does Not Further A Substantial State Interest.***

Assuming the existence here of a "substantial governmental interest" in "residential privacy", the "strict scrutiny" analysis does not stop there. There must be a danger of some harm making the interest a "substantial" one.

i. ***Defendants Offer Of Proof Does Not Demonstrate A Substantial Interest.***

The Defendants' hearsay affidavits do not show a public safety issue, or a residential privacy concern. The Minnesota ADAD Statutes restrict ADAD calls made to telephone "Subscribers". (***Minn.Stat., Sec. 325E.27.***) The term "Subscriber" is defined by ***Section 325E.26*** and by the ***Casino Marketing*** Court to mean "residential subscribers". The purpose of the Statutes being to protect against the invasion of "residential privacy" not "commercial privacy" or business commerce. The ***Casino*** Court said that Sections 325E.26 through 325E.31 all regulate the use of ADADs for "any unsolicited call to a residential subscriber...", (Id. at p. 886, col. 1. ls. 31-41). That statute language and the ***Casino*** Court's interpretation were not altered by the Legislature's ADAD Statute Amendment.

Since the Statute Sections only apply to "residential subscribers", the Defendants' affidavits of LeBlanc, Berkland, Timian, Holt, Pichotta, and Humbert, are irrelevant hearsay opinion because they purport to relate only to calls made to commercial subscribers. Those affidavits do not apply here and must be stricken for that reason.

The ***Casino*** Court said that all of the Statute Sections regulate the use of ADADs for "any unsolicited call to a residential subscriber ... when the purpose of the call is to solicit the purchase or the consideration of purchase of goods or services by the subscriber", subject to stated exempt organizations and exceptions, and "regardless of the content of the message". (Id., p. 886, and see above discussion.) Since all

of the Statute Sections apply to unsolicited ADAD calls "when the purpose of the call is to solicit the purchase ... of goods or services ...", "regardless of the content of the message", none of Defendants' affidavits apply. None of those affidavits relate to ADAD calls made with the solicitation purpose required by the state court.

Most of the affidavits must be disregarded as hearsay which is twice removed. Those affidavits include the LeBlanc, Berkland, and Timian affidavits. A comparison of the LeBlanc and Olson affidavits shows the danger of using hearsay testimony. LeBlanc implied a theoretical danger to intensive care unit patients at Abbott Northwestern, while the Olson affidavit shows how the Abbott ICU staff has built-in safeguards to prevent any harm by any call. Ms. Olson's testimony is first hand, it is current, and it is based on her eleven years of experience with Abbott's ICU and coronary care units.

The LeBlanc Affidavit relates only to alleged commercial telemarketing calls and is irrelevant as to an opinion comparison to noncommercial messages in this case.

None of the affidavits state the time to disconnect an ADAD call, or the length of the message. All of them contain speculative opinion comment and an "alarmist" fear about hypothetical possibilities. None of the affidavits state that ADAD calls should be banned; or that privacy was invaded; or that the parties actually filed a complaint with the Attorney General's Office.

The only approximately relevant affidavit is that of Ms. Lokke. Plaintiff objected to Ms. Lokke's affidavit at trial and

by way of Plaintiff's Reply Brief. Ms. Lokke's affidavit is the only one which does not include an address. Since she has an unlisted phone number, there is no means for the Plaintiff to verify her existence or get an explanation for inconsistencies. Her statement must be thrown out as not being subject to cross-examination. Her statements include speculative and "alarmist" opinion. She does not allege the length of the call or the time for disconnection.

ii. *Even If The Defendants Affidavits Are Allowed, They Do Not Demonstrate A Substantial Interest.*

A sufficient interest must be demonstrated by the government. To be sufficient to weigh in favor of restricting areas of protected speech, the government interest must be "substantial". Free speech may be subordinated only by interests of "vital" importance, (***Elrod v. Burns***, 96 S.Ct. 2673, 427 U.S. 347, 49 L.Ed.2d 547), and the burden of proof to establish such a "substantial" interest is on the government, (***Casino Marketing***, Id.).

Free speech invasion cannot be predicated upon a speculative concern of danger, such as the anticipation of a multitude of annoying phone calls; or, on a fear and apprehension of illegal conduct, (***Ad World, Inc. v. Doylestown Tsp.***, 672 F.2d 1136). Nor is there a danger of harm to residential privacy in communicating noncommercial speech through the use of ADADs. In order to find harm in the exercise of free speech the audience must be "captive" in the sense that it cannot avoid the objectionable speech, (***Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm.***, 100 S.Ct. 2326, 447 U.S. 530.). Where a person can stop reading, or stop

listening, a restriction of speech or the press cannot ordinarily be justified by an interest in protecting viewers, readers, or listeners. The public telephone audience is not "captive" because every telephone subscriber has the ability to intercept, screen or terminate unwanted calls.[1]

Without a danger of some harm there cannot be a "substantial interest" for the state to protect. Without a "substantial interest" to protect the Minnesota statutes are unreasonable and unconstitutional.

In ***Edenfield v. Fane***, 113 S.Ct. 1792, found that unsolicited telephone calls are not such an invasion of privacy as to be considered a threat to a substantial interest. ***Edenfield*** involved a challenge to a rule of the Florida Board of Accountancy that provided that a certified public accountant:

> "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services *** where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication." Fla.Admin.Code, Sec. 21A-24.002(2)(c), quoted in ***Edenfield***.

Another rule of the Board defined "direct, in-person, uninvited solicitation" to include "uninvited *** telephone calls to a specific potential client." Fla.Admin.Code, Sec. 21A-24.002(3), quoted in ***Edenfield***.

In assessing the challenge to this rule, the Court applied

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[1] The court did not envision the proliferation of other electronic devices such as "Caller ID", sophisticated voice mail systems and answering machines designed to identify nuisance callers and buffer the intrusive effect of unsolicited calls at a minimal expense.

the test from ***Central Hudson***. The interests put forward by Florida to justify its prohibition on unsolicited telephone calls were preventing fraud, protecting privacy, and maintaining the fact and appearance of CPA independence in auditing a business and attesting to its financial statements. The Court agreed that "the protection of potential clients' privacy is a substantial state interest", but it concluded that Florida's ban on unsolicited telephone calls did not advance that interest "in a direct and material way", because if persons who receive such calls "are unreceptive to [the] initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern." (***Edenfield***, Id. at 1803.) The Court concluded by saying, "Here, the ends sought by the State are not advanced by the speech restriction, and legitimate commercial speech is suppressed." Id. The Court thus held that Florida's rule violated the Second prong of the ***Central Hudson*** test, which is derived from the second criteria given by ***O'Brien***.

As ***Edenfield*** shows, if Florida's interest in protecting privacy is not advanced by a prohibition on unsolicited telephone calls, because recipients of such calls "need only terminate the call", then it is equally true that the Minnesota Legislature's presumed interest in protecting privacy is not advanced by a prohibition on the use of ADADs. The Minnesota ADAD Statutes violates the First Amendment because it does not advance the government's asserted interest in a direct and material way.

Legislative intent is a significant matter for additional and careful scrutiny in this case. The facts show that the only expression by the Minnesota Legislature was to attend to a

"housekeeping" detail that was merely a "technical change", (***Valenti Aff.***, App. 26, 27). These facts were not refuted by the Defendants in this case. In ***Edenfield*** the Court said the government "must identify with care the interests the State itself asserts [, for] *** the ***Central Hudson*** standard does not permit us to supplant the precise interests put forward by the State with other suppositions". In ***Discovery Network***, the Court looked at the history of the subject ordinance and the purpose of its enactment, noting that the purpose of the city council in passing the law was to prevent residential blight caused by littering. (***Discovery Network***, Id. at 1510). The ***Discovery Network*** Court went on to say, "The fact that the city failed to address its recently developed concern about news racks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition", (***Discovery Network***, Id. at 1510). The necessary comparison to this case is that here, the Defendants did not show any legislative history to support the purposes that the Attorney General alone has attached to the Minnesota ADAD Statutes. ***Discovery Network*** indicates that the burden is on the government to demonstrate the purpose by legislative history and not by a changing whim of a state's attorney general. Further, the Minnesota Attorney General has changed his views as to the purpose of the ADAD Statutes at least twice. In ***Casino Marketing*** the Attorney General argued that the state's purpose was to protect against consumer fraud. That purpose was rejected by the court. In this case the Attorney General has added the alleged purposes of protecting public safety

and business commerce, again, without any supporting proof and without rebuttal to the Plaintiff's contrary proof that the ADAD Statutes' amendment was a mere technical change. That purpose and the absence of proof of the state's true purpose causes the ADAD Statutes to fail on these requirements as explained by ***Discovery Network*** and ***Edenfield***.

c. ***The Government's Interest Is Not Unrelated To The Suppression Of Free Speech In This Case.***

Cases subsequent to ***O'Brien*** found that a government interest may be 'unrelated to the suppression of free speech' when its regulation is "content nuetral", and that the exercise of free speech is subject to reasonable time, place and manner restrictions if they are satisfied without reference to the content of the regulated speech, (***Casino Marketing***, Id. citing ***Century Camera***, ***Ohralik*** and ***Central Hudson***).

i. ***The Minnesota Statute Is Unconstitutional Because It Is Content-Based.***

The exceptions stated under ***Section 325E.27*** allow messages involving "work schedules", "existing business relationships", and "school district business". The exception under ***Section 325E.26, Subd. 4***, excludes all organizations listed in ***Minn.Stats.Sec. 290.21, Subd. 3, Clauses (a) to (e)***. Those organizations include: the State of Minnesota and its political subdivisions; all entities operating exclusively for religious, charitable, public cemetery, scientific, literary, artistic, or educational purposes, or for the prevention of cruelty to children or animals; all entities operating under a lodge system carrying on substantially all of their activities within this state; all war veteran

organizations within this state; and the United States of America. (See ***Minn.Stats., Sec. 290.21, Subd. 3(a) to 3(e).***)

All of these exceptions are distinctly related to message content as well as the classes of people and organizations communicating the message. Quite clearly the exceptions are defined by message content and the statutes are unconstitutional under ***Discovery Network***, ***Edenfield***, ***Moser*** and ***Lysaght***. Whether the statute exceptions are viewed as being based only on message content, or solely on the class of person making the call, either way the operative effect is the suppression of certain types of speech and the Minnesota Statutes are unconstitutional under the ***O'Brien*** test because they are not "unrelated to the suppression of free speech".

In finding the TCPA to be unconstitutional on summary judgment in ***Moser***, Id., the Oregon court found "that the TCPA is a content-based regulation and cannot be justified as a legitimate time, place or manner restriction on protected speech." The TCPA's speech restrictions are related to the content of the pre-recorded message because the statute distinguishes between commercial versus noncommercial speech, (ie: charitable organizations are excepted just as under the Minnesota Statute).

In ***Lysaght*** the New Jersey court granted a preliminary injunction enjoining that states enforcement of its ADAD regulation. The court relied on ***Moser*** and ***Cincinnati v. Discovery Network, Inc.***, 113 S.Ct. 1505, (1993) in concluding that the statute was "content-based" because it distinguishes between commercial and noncommercial speech. [The court noted that ***Casino Marketing*** was decided before the rationale developed in ***Discovery***

Network.]

ii. *The Minnesota Statutes Are Not Unrelated To The Suppression Of Free Speech Because Of The Ulterior Motives Of The Attorney General In This Case.*

The facts show that the Attorney General has a personal ulterior motive to suppress and infringe upon Plaintiff's free speech and his right to receive such communications. The Attorney General has expressly stated his personal objective to eliminate the "LaRouche fringe", (***Van Bergen Aff., Exh. I***, App. 65). He also has an obvious personal interest in blocking ADAD messages which criticize his integrity.

Plaintiff's investigator, Mr. Valenti, contacted all of Defendants' affiants except Ms. Kokke, who could not be located. Based on those discussions, all of the Defendants' affidavits, (except LeBlanc's), relate to an ADAD message by Lewis du Pont Smith which directly attacks the Attorney General's personal integrity. Mr. du Pont Smith and the Plaintiff are both LaRouche supporter's, and the Attorney General has expressed his intention to use his office to suppress LaRouche supporters. The affidavits prove that the Attorney General is focusing on a singular effort to suppress a point of view that he personally disagrees with.

The Attorney General's interest in enforcing the Statutes in accordance with his sole interpretation, show that the government interest here is related to the suppression of ideas. (See ***Defs. Brf.2***, p. 10, ls. 15-17, citing ***U.S. v. O'Brien***.)

d. *The Restriction On Free Speech Cannot Be Greater Than Is Essential To The Furtherance Of A Substantial Interest.*

i. *The Minnesota ADAD Statutes Are Place Unreasonable Time, Place, And Manner Restrictions On Protected Free Speech.*

This part of the ***O'Brien*** test has been further defined to mean that restrictions on free speech are subject to reasonable time, place and manner restrictions. The restrictions must be reasonably tailored to fit the substantial designated interest. The Minnesota statutes are not reasonable within the context of their discriminatory application.

The government has the burden of establishing a "reasonable fit" between the legislature's ends and the means chosen to accomplish those ends." (***Discovery Network***, Id.) In ***Discovery Network*** the Court looked at the history of the enactment of the subject city ordinance to find its "purpose". That Court went on to compare the ordinance restrictions and its enforcement in the particular case with that historical purpose. Here, the Defendants have not met their burden of showing a legislative purpose beyond the making of a mere technical change as a "housekeeping" detail. In making that comparison the Court said, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between the ends and the means is reasonable". The consequence of the suppression of free political speech is certainly not a reasonable fit to the purpose of making a mere technical change in the Minnesota ADAD Statutes that were originally prepared to apply only to

"*commercial telephone solicitation*".

Even if residential privacy, public safety or the protection of business commerce were an established purpose of the legislature, the ADAD Statute restrictions are not a *proper fit* under ***Discovery Network*** or ***Edenfield***.

In applying the analysis of ***Discovery Network*** and ***Edenfield***, and the intermediate ***Central Hudson*** test, ***Moser*** found that the government did not meet its burden establishing a "reasonable fit" between the interest of privacy and the means chosen to promote it. ***Moser*** found no justification in the government's bald assertion that banning commercial solicitations, but not solicitations for non-profit organizations, furthers the protection of residential tranquility. The same imbalance applies to the Minnesota Statute which allows ADAD calls for selected messages at ***Sec. 325E.27*** and for a number of exempt organizations at ***Sec. 325E.26, Subd. 4***.

Moser also found the TCPA failed to provide any justification for distinguishing between prerecorded commercial messages and commercial messages introduced by a live operator. Both "live" caller solicitations and automatic machine calls result in the same level of potential inconvenience to the home. The only distinction is that a "live" operator will likely hold the attention of an uninterested person longer than the second it takes for that same person to hang up on a recorded message. This means that "live" operators are actually more intrusive than recorded messages. The same analysis applies to this case. The statutory distinction between "live" calls and "recorded" calls does not justify banning free speech.

Further, the ***Moser*** court found that ADAD commercial calls banned by the TCPA made up less than 3% of the telemarketing calls received by Americans. The court stated that "Congress is attempting to ban totally a form of commercial speech, for the sake of reducing only slightly the number of telephone solicitations."

The ***Moser*** findings are based on the same affidavits of Mr. Kolker which were presented to the Court in this case. Those affidavits were reviewed and reacknowledged by Mr. Kolker in connection with this case. The offer of proof provided by the Kolker affidavits was not rebutted by any first hand, expert, or any other evidence from the Defendants. The Kolker affidavits are consistent with the findings of Plaintiffs investigator, Mr. Valenti, whose affidavits were also presented to the court in this case.

In ***Lysaght*** the New Jersey court also applied the ***Central Hudson*** analysis. It cited ***Casino Marketing*** in finding the state's interest in promoting residential privacy to be substantial. But, as in ***Moser***, the New Jersey court found that the state did not meet its burden of establishing a reasonable fit between the Act and the privacy interests the state sought to protect. Both commercial and noncommercial prerecorded messages equally disrupt residential privacy. There is no justification to favor one type of message over another. Similarly there is no justification for the Minnesota ADAD Statutes, which exempt certain messages and certain classes of people, but block the Plaintiff's expression of his views. The court found that the number of prerecorded commercial messages make up a very small percentage of all

telemarketing calls, (see ***Kolker Affs.***), and stated, "the fact that commercial speech is perceived as more "offensive" or "annoying" and may thereby generate a larger number of complaints is not by itself a legitimate basis for prohibiting that type of speech. That result would run counter to ***Discovery Network*** that the "low value" of one form of speech is an insufficient justification for banning such speech, (***Discovery***, Id., p. 1516). (See discussion in the ***Lysaght Opinion, Berg.Aff., Exh. IV***, pps. 13-14.)

The New Jersey court also agreed with the ***Moser*** court in deciding that the distinction between prerecorded and live operator messages does not advance the state's interest in protecting privacy. ***Lysaght*** quoted the dissenting portion of the opinion of Justice Tomljanovich in ***Casino Marketing***:

> "the privacy interest being advanced is the interest in being free of interruptions from "the shrill and imperious ring of the telephone." But the live operator requirements advance that interest only incidentally, if at all. Once the person being called picks up the telephone, the interruption of privacy already has occurred. At that point, from a privacy perspective, it makes no difference whether the caller is a person or a machine. The damage to privacy is done, and the solution is the same in either situation: hang up the telephone" (***Casino Marketing***, Id.)

Moser, ***Lysaght*** and the dissent in ***Casino Marketing*** go on to argue that a prerecorded solicitation may even be less intrusive than live solicitations for the reason that it is probably easier to hang up on a machine than on a live operator. (***Lysaght***, Id., pps. 17-18.)

Last, ***Lysaght*** pointed out that some of the earlier technical

problems with prerecorded messages, which prompted passage of the TCPA, (see ***S.Rep.No. 102-178, 102d Cong., 2d Sess. (1991)***, reprinted in 1991 U.S.C.C.A.N. pps. 1968, 1972), have been alleviated through technological advances, (see ***Kolker Affs.***).

This Court can take judicial notice of the findings in ***Moser*** and ***Lysaght***.

The ***Moser*** and ***Lysaght*** holdings are consistent with the U.S. Supreme Court's holdings in ***Discovery Network*** and ***Edenfield***. The contrary holding of the Minnesota court in ***Casino Marketing*** was decided before ***Discovery Network***.

Here, if the Defendants' interpretation of the amended Statutes is necessary to the legislative desire for residential privacy, public safety or to prevent the disruption of commercial enterprise, then it should be a necessary restriction on all ADAD uses including those by exempt organizations whose ADAD calls most certainly pose the same speculative concerns. There is no stated rationale for allowing the Minnesota Statutes exemptions.

The ***Casino Marketing*** case considered the pre-amendment version of ***Minn.Stat., Sec. 325E.26 et seq.*** The statute amendment, House Bill H.F. 2143, added a definition of the term "Message" as "any call, regardless of its content". The amended Minnesota statute has been interpreted by the Attorney General's Office to also restrict non-commercial speech, (***Valenti Aff.***, App. 28-29). The Defendants presume that amendment to impart a "content neutral" quality to the statute, as required by ***Discovery***, ***Moser***, and ***Lysaght***. On analysis, the amendment provides only a superficial appearance of content neutrality. The amended statute is still "content based", and the amendment has

made the statute very ambiguous. The statute retains the same language that the Minnesota Supreme Court used to distinguish the statute's sole application to "commercial telephone solicitation". Under that interpretation, the added definition of the term "message" only applies to "messages" of calls generated for purposes of "commercial telephone solicitation". Even if the amendment provision is viewed as eliminating the distinction between commercial and noncommercial content, the statutes exemption of large groups of individuals and organizations from the restrictions of the statute leaves it with the same problems of any other "content based" law. The Minnesota statute exempts certain classes of messages at ***Sec. 325E.27*** and non-profit organizations, political subdivisions, and many other entities at ***Sec. 325E.26, Subd. 4***. The ***Casino Marketing*** rationale that the statute is a reasonable "fit" that "directly advances" the privacy interests of the state is based on its findings that the telephone is "uniquely intrusive". The "uniquely intrusive" nature of the "shrill and imperious ring of the telephone" is equally intrusive when made by those organizations that are specifically exempt under the statute, as when it is made by a school district, employer, incumbent political candidate or the Plaintiff. The exemptions place a higher value on the communications and content of the messages of those entities, which again is contrary to ***Discovery***, ***Moser***, ***Lysaght***, and the dissent in ***Casino Marketing***.

ii. *The Minnesota ADAD Statutes Place An Unreasonable Prior Restraint On Protected Free Speech.*

Inhibiting the use of ADADs for noncommercial purposes is a prior restraint on freedom of speech because it prevents the spread of ideas and opinions than to ban people from effective channels of communication.

Considering the preferred position of First Amendment guarantees and because prior restraints have the potential of preventing protected speech entirely, prior restraints have always been viewed as particularly offensive to the First Amendment. (***Near v. Minnesota***, 283 U.S. 697.) Beginning with ***Near***, the principle evolved that any system of prior restraint of expression comes to the Court bearing a heavy presumption against its constitutional validity. Since ***Near*** the Court has repeatedly found that, "liberty of the press...has meant, principally although not exclusively, immunity from previous restraints or censorship." (Id., p. 716; ***Organization For A Better Austin v. Keefe***, 402 U.S. 415.)

The Supreme Court held in ***Bantam Books, Inc. v. Sullivan***, 372 U.S. 58, that, "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (Also see, ***U.S. v. Washington Post***, 403 U.S. 713.)

Near is the seminal case on the prior restraint doctrine. In ***Near*** the Supreme Court considered a Minnesota statute which permitted courts to enjoin newspapers which published defamatory material as a public nuisance. Although the appeal was from the entry of such an injunction, the court in ***Near*** speaks almost

exclusively in terms of the effect of the statute itself, and holds:

> "For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of Section 1, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."

The amended ADAD Statutes permit prosecution of violators under ***Minn.Stat., Sec. 8.31***, (ref. ***Sec. 325E.31***), which provides for injunctive relief. Accordingly, the Statutes, as amended, are in and of themselves a prior restraint on protected speech.

The Minnesota ADAD Statutes are a prior restraint that is chilling to the fundamental and essential First Amendment right of free speech. A government regulation which limits or conditions in advance the exercise of freedom of speech or of the press is a prior restraint, (***Fantasy Book Shop, Inc. v. City of Boston***, 652 F.2d 1115). The Minnesota statute is a prior restraint of statements that are in the public interest, such as the political messages that were intended to be communicated by the Plaintiff through the use of ADADs and the Lewis DuPont Smith messages. The statute and the Attorney General's position are chilling due to the threat of penalties, injunction, other civil remedies by the state and by private action, (***Minn.Stat., Secs. 325E.31 and 8.31***),

and a confiscation or encumbrance of property such as ADAD equipment. The rules of prior restraint apply to the states by the Fourteenth Amendment, (***McCrea v. Sperry***, 92 S.Ct. 272, 404 U.S. 939, 30 L.Ed.2d 252).

Any prior restraint of speech, by the government, is presumed to be unconstitutional, and requires a heavy burden of proof to demonstrate its validity, (***Casino Marketing***, Id.; ***Vance v. Universal Amusement Co.***, 100 S.Ct. 1156, 445 U.S. 308, 63 L.Ed.2d 413, rehearing denied 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804).

It has been held that a prior restraint of the publication or republication of a statement that is of public interest is rarely, if ever, permissible, (***Curtis Pub. Co. v. Butts***, 87 S.Ct. 1975, 388 U.S. 130, 18 L.Ed.2d 1094).

A prior restraint is not justified merely to prevent an invasion of privacy, (***Org. for a Better Austin v. Keefe***, Ill. 91 S.Ct. 1575, 402 U.S. 415, 29 L.Ed.2d 1). Legitimate informational telephone calls do not present a threat to privacy, (***Edenfield***, Id.). In order that a prior restraint of speech be justified because of a public interest there must be a "Clear and Present Danger". Under this doctrine, it must be clearly shown that a serious and immediate danger exists that threatens an irreparable injury to interests which the government may lawfully protect. The government interest to be served must be compelling. Only the gravest abuses, endangering paramount interests, give occasion for a permissible limitation of free speech. (***Thomas v. Collins***, 65 S.Ct. 315, 323 U.S. 516; and discussed at ***C.J.S., Vol. 16B Const.Law, Sec. 543, p. 37.***) The restraining regulation must be

closely drawn to avoid unnecessary abridgement, and there must be no available means of serving such interest which would be less intrusive on speech. (***John Donnelly & Sons v. Campbell***, 639 F.2d 6, affirmed 101 S.Ct. 3151, 453 U.S. 916.

The Minnesota statute protects against a presumed invasion of privacy by some callers while at the same time allowing an intrusion by persons specifically exempted from application of the statute. Under the statute, persons who are exempt can deliver the same messages or type of messages that the Plaintiff intends to make in his political campaign. The entities falling within the exempt categories of the legislation often promote their own private political interests. If the Legislature really believed that the use of ADADs threatened a "serious and immediate danger of irreparable harm" to a compelling government interest, the statute would have been implemented to protect against that harm by all citizens.

The Minnesota statute does not reach a "compelling interest" requiring the restriction of protected noncommercial speech. In ***Casino Marketing*** the court applied a lower standard for determining adequacy of the state's interest. That court required only a showing of a "substantial interest" because of its interpretation that the statute applied to commercial speech, not protected areas of noncommercial speech. Quoting ***Century Camera*** and ***Ohralik*** it concluded that commercial speech is given 'a limited measure of protection commesurate with its subordinate position in the scale of First Amendment values', and applied a balancing between the speech sought to be restricted and the interests asserted by the government. The court found a

substantial state interest in protecting residential privacy. That interest is not substantial given the circumstances of this case and the analysis of ***Edenfield***.

In determining the states interest in protecting privacy it should be recognized at the outset that residential "listeners" invite solicited and unsolicited calls into their homes by owning phones and subscribing to a telephone line. Beyond that, when a potential listener wants to enjoy an uninterrupted "meal, a restful soak in the bathtub,...the intimacy of the bedroom", (examples given in ***Casino Marketing***, Id.), or any privacy from a phone, there are a number of means available to afford any degree of privacy desired. A phone subscriber can easily unplug a phone for a brief period of complete privacy; or turn off the ringer; or reduce the sound of the ringer; or switch the call signal from an offensive ring to a light or a tone; or intercept the call, either immediately or after a certain number of rings, by way of an answering machine or voice mail system which can give the caller an announcement and take a message; or the subscriber can hang up on a caller. A subscriber can even assure the receipt of solicited or emergency calls at times when complete privacy may otherwise be desired. Many answering machines enable callers, who have been preselected by the subscriber, to avoid the interception by using a limited access security code.

The statute is a prior restraint. It does not protect a compelling state interest. Its objectives can be met by each phone user in various ways without any assistance through state regulation. It discriminates between citizens and organizations. And the ADAD use being regulated does not pose a serious or

immediate danger of irreparable harm to any government or private interest.

2. The Minnesota ADAD Statutes Abridge First Amendment Freedom Of Speech Under The Fourteenth Amendment Because They Are Vague.

The statute as amended is so vague that the state's Attorney General's Office believes it to encompass all messages by callers other than those specifically exempted from its application. (See ***Valenti Aff.***) The statute retains its original language isolating its purpose in restricting "commercial telephone solicitation". Both the pre and post amendment versions fail to connect the "commercial telephone solicitation" definition with the statutes operative provision, Sec. 325E.27. And, based on the Minnesota Supreme Court's decision in ***Casino Marketing***, Id., that the Statute applies solely to "commercial telephone solicitation", the added definition for the term "message" applies only to calls made for "commercial solicitation" purposes. A statute that restricts a First Amendment right must be drawn with "precision" and "narrow specificity", (***Strastny v. Board of Trustees of Central Washington University***, 647 P.2d 496, 32 Wash.App. 239, cert. den. 103 S.Ct. 1528, 75 L.Ed.2d 950). The Minnesota statute does not meet that test. First Amendment rights are not to be abridged or even chilled by statutory vagueness and the Minnesota statute is unconstitutional for that reason. (***Bare v. Gorton***, 526 P.2d 379, 84 Wash.2d 380.)

3. The Minnesota ADAD Statutes Abridge First Amendment Freedom Of Speech Under The Fourteenth Amendment Because They Are Over-Broad.

A statute is over-broad if within its reach it prohibits constitutionally protected activity as well as activity that may be prohibited without offending constitutional rights. (*State v. Century Camera Inc.*, 309 N.W.2d 735, (Minn. 1981).) The Minnesota statute is over-broad because it prevents non-exempt parties from delivering the very same ADAD message in the same unrestricted manner as those parties who are exempt under it. Where the over-breadth of the challenged law is both real and substantial and where the words of the law leave no room for a narrowing construction, so that in all its applications the law creates an unnecessary risk of chilling free speech, the law is unconstitutional. (*Board of Airport Comms. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *New York v. Ferber*, 458 U.S. 747 (1982).)

B. The Minnesota ADAD Statutes, or the Minnesota Attorney General's threatened enforcement thereof, violate the Plaintiff's Fourteenth Amendment equal protection rights under the United States Constitution.

The statute denies equal protection under the First and Fourteenth Amendments. The Minnesota statute's discriminatory application of its free speech restrictions between exempt and non-exempt persons and organizations, denies non-exempt persons their right to equal protection. Any restriction on First Amendment rights must be narrow, reasonable, and the subject of equal protection throughout the community, (*Entertainment Systems, Inc. v. Selita*, D.C.N.Y., 319 F.Supp. 686). Such restrictions

must apply to all speech, (*Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268).

If the Section 325E.27 exceptions are not based on content, then they allow the exempt callers to make "any call, regardless of its content". That means the exempt entities can promote favorite political, charitable, commercial and noncommercial messages without exception. Since a city's mayor has an existing business relationship with its residents, an incumbent mayoral candidate could then use ADADs with recorded political messages, to the exclusion of his opposing candidates. (See the broad definition of "existing business or personal relationship" in Casino, 491 N.W.2d at p. 886, col. 2, ls. 4-21, esp. ls. 17-21.) Likewise, any other message could be sent by ADADs used by exempt organizations and persons.

There is no rationale whatsoever for guarding the public's safety from some commercial, political or other calls made by some persons, while at the same time allowing the identical types of calls and messages to be made by the excepted persons.

The affidavit of Loewe does not state that there were no complaints made against callers in the exempt classes. Nor is the targeted group of subscribers a narrow one because there are numerous entities that fall within the exceptions.

The amended Statutes, as interpreted by the Defendants, violates the Plaintiff's rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. When the government permits one speaker to exercise a right to speak, another speaker cannot be denied similar rights without substantial justification for differentiating between speakers.

(Police Department of Chicago v. Mosely, 408 U.S. 92.) When the conduct sought to be regulated involves expressive conduct within the protection of the First Amendment, any discrimination among speakers must be tailored to serve a substantial governmental interest. (Mosely, Id.; Williams v. Rhodes, 393 U.S. 23.) This substantial government interest must be in fact a compelling interest because a deprivation of fundamental First Amendment rights is subject to the strict scrutiny test under the Equal Protection clause of the Fourteenth Amendment. (Shapiro v. Thompson, 394 U.S. 618.)

In Auburn Police Union v. Tierney, 756 F.Supp. 610, (D.Me. 1991), the court found that the legislature had carved out exceptions to a statutes restrictions of free speech for solicitation purposes. The amended statute violated the equal protection clause of the Fourteenth Amendment based upon the exceptions that had developed. The court said the state cannot permissibly choose "among causes for which it will lift its heavy burden on free speech interests." (Auburn, Id., p. 618.) The Supreme Court has settled the point that "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." (First National Bank of Boston v. Bellotti, 435 U.S. 765.)

As interpreted by Defendants, the amended law favors school districts, businesses with a large customer base (ie: telephone, electric, gas company, political subdivisions such as cities that provided services to residents, etc.), and employers. These classes are exempt from application of Minn.Stats., Secs. 325E.27

and 325E.30. The Amendment provides that the term "message" is expanded to include "any call, regardless of its content." That means the persons exempt from application of Sections 325E.27 and 325E.30 can use ADADs to deliver "any call, regardless of its content". Exempt persons and organizations can deliver political and informational messages, (or even commercial messages), through the use of ADADs without a live operator or time-of-day restriction. That application of the law will operate to protect the political interests of entrenched classes and will restrict the free expression of minority opinions and beliefs.

The Plaintiff is entitled to an equal application of the law. There is no justification on the basis of public safety, residential privacy, or business commerce, to allow the broad speech exceptions now provided for exempt persons and organizations. The ADAD calls planned by the Plaintiff pose no greater risk then similar calls that may be made under the amended Statutes by school districts, any person with a large customer base, or employers. The Statutes should either block the use of ADADs for any purpose; or if allowed by any person, there use must be narrowly limited to messages that fall within the specific public purpose designated.[2]

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[2] Since the term "message" is now expanded to include both commercial and noncommercial speech, the exempt organizations under the amended Statutes may use ADADs to deliver any commercial or noncommercial message. That application favors commercial speech by those exempt persons over the protected noncommercial speech of the Plaintiff, which is impermissible under Metro Media, Inc. v. City of San Diego, 453 U.S. 490; and Gilleo v. City of Ladue, 986 F.2d 1180 (8th Cir. 1983), cert. granted, City of Ladue v. Gilleo, 114 S.Ct. 55, (No. 92-1956, argued 2/23/94).]

C. The Minnesota ADAD Statutes Are Preempted By Federal Law.

When acting within constitutional limits, Congress is empowered to preempt state law by so stating in express statutory terms. (***California Fed. Sav. & Loan Ass'n. v. Guerra***, 479 U.S. 272; ***Meyer v. Intl. Playtex, Inc.***, 724 F.Supp. 288, 290.) In 1991 Congress enacted the TCPA amending the Communications Act of 1934. Section (e) of the TCPA is an express preemptive provision. It states that "nothing in this section or in the regulations prescribed under the section shall preempt any State law that imposes more restrictive intrastate requirements or regulations...". The Minnesota statute is not limited to intrastate telephone calls, and it is less restrictive than the TCPA.

Section (f) of the TCPA authorizes states to bring actions under the TCPA exclusively in the federal courts and Section (c) provides a private right of action in state court. This shows that Congress intended the states to enforce the federal TCPA law, but only in the federal courts. It also shows that Congress has already provided a private right of action in state court for violations of the TCPA. The Minnesota law provides (i) state court jurisdiction for imposing (ii) less restrictive (iii) interstate requirements; and, it subverts the federal TCPA for all three reasons.

The Trial Court decided that the Statutes were not preempted in this case because Plaintiff did not allege that he would be making calls over interstate phone lines. The Trial Court mistakenly ruled against the Plaintiff on this point. The Plaintiff's Complaint and briefs argue for his right to receive

information from ADAD callers as well as to use ADADs to communicate his own views. The Minnesota ADAD Statutes block the Plaintiff from receiving interstate ADAD calls. The Statutes do not limit their restrictions to calls originating within the state and thus do regulate interstate calls. The Minnesota Statutes are preempted by federal law.

CONCLUSION

The Minnesota ADAD Statutes are an unconstitutional abridgment of the freedom of speech and a violation of the Plaintiff's due process and equal protection guaranties. The Statutes are preempted by federal law because they impose restrictions on interstate communications.

THEREFORE, Plaintiff seeks a permanent injunction enjoining the Defendants from enforcing the Statutes in connection with the use of ADADs for the communication of political or other ideas, and asks the Court for declaratory relief finding the Statutes to be unconstitutional infringements of protected speech.

Dated: October 20, 1994.

Respectfully submitted,

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Attorney for Plaintiff

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No: 94-3047MNST

Richard Van Bergen,	)	**AFFIDAVIT OF SERVICE BY MAIL**
Appellant,	)	
vs.	)	
The State Of Minnesota, et al,	)	
Appellees.	)	

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Daryl J. Bergmann, being duly sworn on oath says that: on the 20th day of October 1994, he served two copies of Appellant's Brief And Addendum and one copy of Appellant's Joint Appendix filed with the United States Court Of Appeals For The Eighth Circuit on this same day, upon Peter Ackerberg, representing the State of Minnesota and Hubert H. Humphrey III, in his capacity as the Attorney General, at the Attorney General's Office, State of Minnesota, 1400 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101, phone number: 612-282-5717; by depositing true and correct copies of said documents in the United States mail on this date, at the U.S. Post Office at 5000 Green Lane, St. Paul, Minnesota, 55111, with proper prepaid first class mail postage affixed and duly addressed to the above address for Appellee's counsel.

All parties required to be served have been served.

I declare and certify under penalty of perjury that the foregoing is true and correct. Executed this 20th day of October, 1994.

Signed: Daryl J. Bergmann
612-896-0065
5025 W. 102 St.
Bloomington, MN 55437

Subscribed and sworn to before me
this 20 th day of October 1994.

Notary Public

Notary Public Minnesota
PATRICIA A. NELSON
HENNEPIN COUNTY
31 1997

ADDENDUM

3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard T. Van Bergen,

Plaintiff,

vs.

Civil No. 3-94-731
MEMORANDUM OPINION AND ORDER

The State of Minnesota, Hubert H. Humphrey III, in his capacity as Attorney General of the State of Minnesota,

Defendants.

Daryl J. Bergmann, Business Legal Services, Bloomington, Minnesota, for plaintiff.

James P. Jacobson and Peter Ackerberg, Minnesota Attorney General's Office, Saint Paul, Minnesota, for defendants.

Introduction

The plaintiff, Richard T. Van Bergen, was heard by this Court on the merits of his request for declaratory and permanent injunctive relief. On June 30, 1994, the Court heard and denied plaintiff's Application for a Temporary Restraining Order; pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the Court scheduled the matter for trial. Testimony was taken, affidavits and memoranda were filed, and the arguments of counsel were heard. Van Bergen has raised a number of federal and state constitutional challenges to the Minnesota Automatic Dialing-Announcing Device ("ADAD") statute, Minn. Stat. §§ 325E.26-.31 (1992) ("the ADAD statute"). Plaintiff contends that the ADAD statute violates:

devices ("ADADs").[2] Minn. Stat. §§ 325E.26-.31. The ADAD statute forbids a "caller"[3] from using an ADAD to disseminate prerecorded or synthesized voice messages unless the caller has the consent of the recipient -- termed a "subscriber"[4] -- to deliver the message. The ADAD statute contemplates that a caller can obtain permission either through a live operator or by virtue of the fact that the subscriber may have previously consented to or authorized receiving the message. Id. § 325E.27. The statute creates three categories of messages for which the subscriber's consent is not required: (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) messages advising employees of work schedules. Id.

Any ADAD machine must be designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber. Id. § 325E.28. If the caller uses a live operator to obtain consent from the subscriber, the operator

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[2] An automatic dialing-announcing device is "a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." Minn. Stat. § 325E.26.

[3] A "caller" is defined as "a person, corporation, firm, partnership, association, or legal or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or a telephone line." Minn. Stat. § 325E.26, subd. 3.

[4] A "subscriber" is defined by the statute as "a person who has subscribed to telephone service from a telephone company or the other persons living or residing with the subscribing person." Minn. Stat. § 325E.26, subd. 5.

must disclose certain information at the outset of the call.[5] Id. § 325E.29. ADADs may not be used between the hours of 9:00 p.m.and 9:00 a.m. The ADAD statute also places time of day limits on "commercial telephone solicitations."[6]

In 1992, the ADAD statute was challenged as violative of the First Amendment in Minnesota state court. In State by Humphrey v. Casino Marketing Group, the Minnesota Supreme Court analyzed the ADAD statute and determined that its provisions regulate the use of ADADs for "commercial telephone solicitation," as that term is defined in Minn. Stat. § 325E.26, subdivision 4.[7] 491 N.W.2d 882, 886 (Minn. 1992), cert. denied 113 S. Ct. 1648

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[5] The operator must disclose

> (1) the name of the business, firm, organization, association, partnership, or entity for which the message is being made;
>
> (2) the purpose of the message;
>
> (3) the identity or kinds of goods or services the message is promoting; and
>
> (4) if applicable, the fact that the message intends to solicit payment or commitment of funds.

Minn. Stat. § 325E.29

[6] The ADAD statute prohibits the making of "commercial telephone solicitations" between the hours of 9:00 p.m. and 9:00 a.m. Minn. Stat. § 325E.30. A "commercial telephone solicitation" is "any unsolicited call to a residential subscriber when the person initiating the call has not had a prior business or personal relationship with the subscriber, and when the purpose of the call is to solicit the purchase or the consideration of purchase of goods or services by the subscriber." Id. § 325E.26, subd. 4. The Statute exempts from the definition of commercial telephone subscription those calls initiated by various organizations such as non-profit organizations, charities, fraternal organizations, etc.

[7] See supra note 6.

(1993). Having determined that the statute regulates only commercial speech, the court evaluated its constitutionality under the test set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343 (1980) and Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028 (1989).

The Minnesota Supreme Court held that the ADAD statute constitutionally regulated the time, place, and manner of commercial telephone solicitations using ADADs. Casino Marketing Group, 491 N.W.2d at 891-92. The court identified residential privacy as the substantial interest served by the ADAD statute and determined that the use of ADADs to deliver commercial messages "intolerably encumbers fundamental notions of residential privacy."[8] Id. at 888. The court concluded that the ADAD statute struck an acceptable balance between the value of disseminating information efficiently and the privacy interest of a nonpublic forum. Id. at 890.

During the 1994 regular session, the Minnesota Legislature amended the ADAD statute to define a message as "any call, regardless of its content." 1994 Minn. Sess. Law Serv. 523 (West). The amendment thus defines a term which appears in section 325E.27, restricting the use of ADADs to deliver prerecorded or synthesized voice messages, and in section

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[8] The court rejected an argument that the consent requirement would guard against telemarketing fraud, reasoning that the requirement of using a live operator would not directly advance such a purpose.

325E.29, detailing what must be said when such a prerecorded or synthesized voice message is immediately preceded by a live operator. The amendment took effect on July 1, 1994.

B. Van Bergen's Campaign for Governor

Richard Van Bergen declared his candidacy for the Minnesota governor's office in December of 1993. He officially registered on July 5, 1994, as a Democratic/Farmer-Labor candidate for the September primary election. (Aff. of Richard Van Bergen, ¶ 3.) See Minn. Stat. § 204B.09, subd. 1 (establishing the date for registration). Van Bergen asserts that he has focused his campaigning efforts on the use of ADADs to disseminate a prerecorded message which announces his candidacy for the governor's office and urges the listener to vote in the primary. (Van Bergen Aff. ¶ 4.) Van Bergen contends that he lacks the financial resources to purchase an automatic dialer (known as a "predictive dialer") which connects the subscriber to a live operator or to hire enough employees to staff a telecommunications campaign; thus, he alleges that he is entirely dependent on the use of automatic dialing and prerecorded message technology. (Id. ¶ 8.) Van Bergen contends that for every day he cannot use ADADs to deliver his message, he has lost the opportunity to contact over 4,200 subscribers per day. (Van Bergen Aff. ¶ 9.)

Analysis

I. Threshold Issues

A. The Defendants' Immunity from Suit

The defendants contend that this Court lacks jurisdiction, under the Eleventh Amendment, over plaintiff's claims against the State. The defendants further contend that the state law claims against the Attorney General in his official capacity must be dismissed for the same reasons. The Court will address each argument in turn.

1. The State's Immunity from Suit

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. Regardless of the nature of the relief sought, "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment" Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984); accord Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347 (1974); Hans v. Louisiana, 134 U.S. 1, 15-18, 10 S. Ct. 504 (1890). The test for determining whether a state has waived its Eleventh Amendment immunity to suit in federal court is "a stringent one." Atascadaro State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985). Plaintiff adduced no evidence and made no argument that the State

has consented to suit in this action. Nor has plaintiff argued that Congress abrogated the state's immunity under the Eleventh Amendment by statute, such that it may be sued for an alleged violation of the federal constitution. The State of Minnesota has not consented to suit in this action and, therefore, this Court lacks jurisdiction over the claims against it under the Eleventh Amendment.

2. The Attorney General's Immunity from Suit

There is an exception to the Eleventh Amendment for suits challenging the constitutionality of a state official's action. Thus, a citizen of a state can sue a state official to enjoin the prospective unconstitutional actions of that official. Edelman, 415 U.S. at 666-67, 94 S. Ct. at 1357-58; Ex parte Young, 209 U.S. 123, 160, 28 S. Ct. 441, 454 (1908). The ADAD statute provides that "[a] person who is found to have violated [the ADAD statute] is subject to the penalties and remedies, including a private right of action to recover damages, as provided in section 8.31." Minn. Stat. § 325E.31. Section 8.31 defines various duties of the attorney general; subdivision 2 states that the attorney general shall investigate and assist in the punishment of illegal practices. Minn. Stat. § 8.31, subd. 2. Therefore, with respect to Van Bergen's claims that the ADAD statute violates the federal constitution, the Court notes that the Attorney General is charged with the enforcement of the ADAD statute, and plaintiff may seek an injunction of his future

enforcement actions.

Under Eleventh Amendment jurisprudence, a federal district court cannot exercise pendent jurisdiction to hear a state law claim against a state official. Pennhurst, 465 U.S. at 120-21, 104 S. Ct. at 918-19 (1984). Van Bergen contends that the bill which contained the amendment was passed in violation of the Minnesota constitutional requirement that "[n]o law shall embrace more than one subject, which shall be expressed in its title," such that the manner in which it was passed obscured its purpose and effect from the legislature and the public.[9] Minn. Const. art. 4, sec. 17.[10] Van Bergen also contends that the ADAD statute violates the Minnesota constitution's free speech guarantees. To the extent that Van Bergen alleges that Attorney General Humphrey has violated or will violate the Minnesota Constitution through his enforcement of the ADAD statute, the Court lacks jurisdiction to decide such a claim.

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[9] Thus, although plaintiff and his supporters monitored the legislature to learn of proposed restrictions on the use of ADADs, they contend that they did not become aware of the amendment until it was published in the session law service on June 7, 1994.

[10] "The single subject clause is intended to prevent 'fraudulent insertion' of matters wholly unrelated to the bill's primary subject, not to prevent comprehensive legislation." Metropolitan Sports Facilities Comm'n v. Hennepin County, 478 N.W.2d 487, 491 (Minn. 1991). The constitutional provision requires that "all matters in the bill be 'germane' to one general subject." Id. (citing Blanch v. Suburban Hennepin Regional Park Dist., 449 N.W.2d 150, 154-55 (Minn. 1989)). The challenged amendment to the ADAD statute was part of a bill entitled "A bill for an act relating to telecommunications."

B. Standing

Van Bergen contends that the Minnesota statute is preempted by the TCPA is based upon 47 U.S.C. § 227(e)(1) of the TCPA, which reads as follows:

> (e) **Effect on State Law.**
>
> (1) **State law not preempted**
>
> Except for [technical and procedural standards set forth at 47 U.S.C. § 227(d)] and [provisions concerning a state's use of a national database of subscribers who do not wish to receive telephone solicitations], nothing in this section [i.e., section 227] or in the regulations prescribed under this section shall preempt any state law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitations.

47 U.S.C. § 227(e)(1).

Van Bergen argues that the ADAD statute regulates and imposes more restrictive requirements on both the intrastate and interstate use of ADADs and artificial/prerecorded voice messages. Plaintiff bases this argument on the state statute's definition of "caller." A "caller" subject to the restrictions of the state statute is "a person, corporation, firm, partnership, association, or legal or commercial entity who attempts to contact, or who contacts, a subscriber in this state

by using a telephone or a telephone line." Minn. Stat. § 325E.26, subd. 3. Van Bergen argues that the ADAD statute specifies only the location of the recipient of the call; the location of the caller is not similarly restricted to those in the state. Thus, the Minnesota statute regulates the use of ADADs for calls which originate both within the state and outside the state. Because it attempts to regulate interstate calls, Van Bergen concludes, the state statute falls outside the scope of the saving language of 47 U.S.C. § 227(e)(1) and is preempted.[11]

Van Bergen has represented that he intends to use ADADs to contact Minnesota residents (1) to encourage them to vote in the upcoming primary and general elections and (2) to introduce himself to the public as a candidate for governor. Van Bergen is a Minnesota resident; there is no evidence presently before the Court that he intends to connect his ADAD machines to telephone lines anywhere other than in Minnesota. Thus, regulation of his use of ADADs would involve intrastate communications. A threshold issue before the Court, therefore, is whether a plaintiff for whom the law as applied to him is not violative of

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[11] The parties do not dispute that the state statute imposes more restrictive regulations or requirements on the use of ADADs and artificial/prerecorded voice messages. It is clear that the state statute is more restrictive in that it affects a larger class of telephone messages -- the federal statute only applies to commercial solicitations, whereas the state statute -- as amended in 1994 -- applies to all messages, commercial or noncommercial. Nor do either of the parties contend that the Minnesota statute is a prohibition on the use of ADADs; the use of automatic dialing machines is conditioned upon the caller acquiring the prior consent of the recipient before a prerecorded message is played. Thus, the only issue under the federal statute's preemption clause is whether the Minnesota statute is an intrastate regulation.

the Supremacy Clause has standing to challenge the statute as facially violating the Supremacy Clause.

As a general rule, even though the very same allegedly illegal act that affects the litigant also affects a third party, a litigant must seek to vindicate "'his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 474, 102 S. Ct. 752, 759 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975)). Thus, "one to whom application of a statute is constitutional will not be heard to attack the statute on the grounds that impliedly it might also be taken as applying to other persons or other situations on which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21, 80 S. Ct. 519, 522 (1960). One exception to this rule is the doctrine of third-party standing: in certain limited circumstances, a party can raise the rights of third parties in light of (a) the relative inability of the third party to assert his own rights, Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868 (1976) or (b) the dependency of the litigant's interests on establishing the rights of a third person, Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976). The plaintiff has alleged no connection between himself and the rights of third party interstate users of ADAD technology such that he may challenge the constitutionality of the ADAD statute on the grounds that it applies to interstate

communications. Van Bergen therefore lacks the ability to challenge the validity of the Minnesota statute under the Supremacy Clause on behalf of some unknown third party who may wish to use ADADs for interstate communications.

The standing doctrine set forth in Raines does not apply to challenges made under the First Amendment; courts allow a plaintiff to challenge a statute on its face for overbreadth:

> [A]n individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court -- those who desire to engage in legally protected expression but how may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

Board of Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574, 107 S. Ct. 2568, 2572 (1987). The "overbreadth" doctrine is limited to First Amendment jurisprudence and does not apply to challenges brought under the Supremacy Clause or other constitutional provisions. See generally 4 Ronald D. Rotunda & John E. Nowack, Treatise on Constitutional Law: Substance and Procedure, § 20.8 at 26-27 (2d ed. 1992). Therefore, Van Bergen cannot be heard to claim that the federal TCPA statute preempts Minnesota's ADAD statute since he cannot show that any injury to himself is fairly traceable to the fact that the Minnesota statute may regulate the interstate use of ADADs.

II. Constitutionality of the Minnesota ADAD Statute

Van Bergen contends that the ADAD statute, as amended,

violates the United States Constitution for two reasons. First, plaintiff argues that the amended statute violates his First and Fourteenth Amendment right to free speech.[12] Second, Van Bergen contends that the amended statute exempts large groups of organizations in a discriminatory manner, in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court will address each argument in turn.

A. Violation of the First and Fourteenth Amendments.

1. Is the statute content-based or content-neutral?

The degree of scrutiny to which a restriction of First Amendment speech rights will be subjected depends, in the first instance, upon the nature of the statute at issue. Content-based regulations of speech are subjected to a higher degree of scrutiny than content neutral regulations. The former type of regulation is subjected to strict scrutiny; it must be narrowly drawn to achieve a compelling state interest by the least-restrictive means possible. Ward v. Rock Against Racism, 491

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[12] Van Bergen alleges that the Statute as amended is unconstitutionally overbroad and vague. The Court concludes, see infra, that the statute operates as a content-neutral regulation of conduct, the use of a specified form of technology. Accordingly, the statute's overbreadth must be "substantial" as well as real. Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18 (1973). The statute does not prohibit the use of the telephone to communicate to the public, nor does it prohibit the use of ADAD machines in toto. Plaintiff has failed to demonstrate that the statute is substantially overbroad. With respect to plaintiff's vagueness argument, the Court concludes that the statute is specific in identifying the conduct that is restricted: a caller may not use ADADs to deliver any prerecorded or synthesized voice messages without first obtaining the recipient's consent.

U.S. 781, 798 n.6, 109 S. Ct. 2746, 2758 n.6 (1989). The latter type of regulation is subjected to a balancing analysis and must be narrowly tailored to serve a significant state interest while leaving open ample alternative means of communications. Id. In reviewing the constitutionality of the ADAD statute prior to its amendment in 1994, the Minnesota Supreme Court concluded that the statute was a time, place and manner restriction on commercial speech. Casino Marketing, 491 N.W.2d at 891-92. The plain language of the ADAD statute as amended indicates that its restrictions now apply to the use of ADADs to deliver any prerecorded or synthesized voice message, regardless of the content. The message therefore no longer needs to relate to the "purchase or consideration of purchase of goods or services by the subscriber." Minn. Stat. § 325E.26, subd. 4. Accordingly, the Court concludes that the ADAD statute is now content-neutral.[13]

2. Constitutionality.

"[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech,

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[13] Plaintiff has contended that the ADAD statute operates as a prior restraint on free speech. A "prior restraint" is "any governmental order that restricts or prohibits speech prior to its publication." 4 Ronald D. Rotunda & John E. Nowack, Treatise on Constitutional Law: Substance and Procedure, § 20.16 at 80 (2d ed. 1992). In this case, the plaintiff's ability to utter speech has not been restricted; rather, the use of one form of technology for disseminating that speech has been restricted. Therefore, the statute does not act as a prior restraint. See Casino Marketing, 491 N.W.2d at 886-87.

provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" Ward, 491 U.S. at 791, 109 S. Ct. at 2753 (1989). The defendants contend that, whereas the level of scrutiny set forth in Ward is appropriate for regulations that restrict access to a public forum, the statute at issue here regulates a speaker's access to a nonpublic forum; hence, a content-neutral time, place, or manner regulation need only be "reasonable."

The Supreme Court has identified three fora for purposes of time, place and manner regulations: public fora, limited public fora and nonpublic fora. "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" Cornelius, 105 S. Ct. at 3449 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 954 (1983).[14] The government may create a public forum by designating a place or channel of communication for use by the public at large. Cornelius, 105 S. Ct. at 3449; Perry Educ. Ass'n, 460 U.S. at 45-46. Van Bergen contends that the telephone lines constitute a designated public forum because government regulation has made that private property available for public use. The defendants apparently

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[14] The Perry Court described this end of the public forum spectrum as including "streets and parks which 'have immemorially been held in trust for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"

agree, stating that Van Bergen "seeks access to the privately-owned telephone system that is dedicated to public use by federal and state regulations." Defs.' Response at 2. Defendants nevertheless contend that the telephone is a "nonpubilc forum."

The Court concludes that the telephone lines are a designated public forum. The Minnesota legislature has vested regulatory authority over telephone companies in the department of public services and the public utilities commission. Minn. Stat. § 237.02. The telephone lines are private property which, through governmental regulation, have become available for public use. Therefore, a time, place and manner restriction must be "narrowly tailored to meet a substantial government interest and leave open ample alternative means of communication." Ward, 491 U.S. at 791, 109 S. Ct. at 2753.

Van Bergen contends that the statute cannot be "justified without reference to the content of the regulated speech" in that the Attorney General allegedly has an ulterior motive in enforcing the ADAD statute -- a personal desire to stifle the speech of plaintiff and other supporters of Lyndon La Rouche. As the Ward Court recognized, "A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." 491 U.S. at 791, 109 S. Ct. at 2754. The record does not support a conclusion that the alleged motives of the Attorney General are attributable to the Minnesota

Legislature.[15] The purpose a statute will serve is distinguishable from the motive that prompted the legislature to pass it. See United States v. O'Brien, 391 U.S. 379, 383, 88 S. Ct. 1673, 1682 (1968). Furthermore, Van Bergen has presented no evidence that the amended statute has been selectively enforced on the basis of the speaker's message. Thus, there is insufficient evidence to find that the ADAD statute was passed in order to suppress the views of particular speakers.

The defendants have offered two rationales for the ADAD statute: (1) the protection of public safety and privacy, and (2) the prevention of the disruption of businesses operating within the state. The attorney general's office received numerous complaints from persons in the state -- primarily businesses, but also state agencies and individuals -- concerning recorded political messages which would occupy those persons' telephone lines. These calls created a perception that a problem existed with ADAD machines that were delivering noncommercial messages; the attorney general's office informed these complainants that the only body to address their concerns was the legislature. Aff. of Amy Finken, ¶¶ 3, 5.)

With respect to the state's interest in protecting privacy, the Court takes note of the state supreme court's analysis of subscribers' residential privacy interests in the Casino Marketing decision. See Casino Marketing, 491 N.W.2d at 888-90.

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[15] For this reason, the Court earlier quashed the plaintiff's trial subpoena for the Attorney General. See Order, July 12, 1994.

The United States Supreme Court has long held that the state has a substantial interest in securing residential privacy. See Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988); Rowan v. United States Post Office, 396 U.S. 1035, 90 S. Ct. 679 (1970); Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920 (1951). Van Bergen argues that the restrictions in the ADAD statute are not reasonable in light of present telecommunications technology, specifically such devices as "caller ID" devices, voice messaging and answering machines. These technologies would be used by the recipients of the prerecorded message, however, to avoid taking the unsolicited call. To the extent a home is a person's castle, the Constitution does not require one to dig a moat around it to secure one's privacy.

With respect to the state's concern for public safety, the defendants have offered affidavits indicating that people have experienced difficulty getting an ADAD-placed prerecorded message to disengage the telephone line once the recipient of the call has hung up. (Aff. of Amy Finken. ¶ 4; .) One affiant attempted to call for assistance when her son began to have seizures, only to find that an ADAD-placed prerecorded message which she received at her unlisted telephone number would not disengage the line. (Aff. of Deb Lokke.) Hospitals have also received prerecorded messages placed by ADADs. (Aff. of Dennis Berkland.) The defendants argue that this delay poses a threat to public safety in that subscribers can be prevented from dialing emergency assistance numbers. Plaintiff responds that the

defendant's interest in public safety is not adequately served by this regulation of the use of ADAD technology; for example, the message complained of by a number of defendants' affiants was transmitted by a machine that is programmed to disconnect ten seconds after the recipient of the call has hung up. (Aff. of Philip Valenti). A time, place and manner regulation need not eliminate all of the problems addressed by the statute; it is sufficient if the government's interest "would be achieved less effectively absent the regulation." Ward, 491 U.S. at 799, 109 S. Ct. at 2758. The use of a live operator who could, if a subscriber did not consent to listen to the prerecorded message, disengage that line immediately and move on to the next call, would help eliminate the possibility of the unwanted delay which results when an ADAD fails to disengage immediately.

With respect to the impact of ADAD technology on businesses, the defendants' affidavits support the defendants' concern that ADAD technology allows prerecorded messages indiscriminately to "roll through" a business, occupying phone lines sequentially or simultaneously. (Aff. of Sharon Holt; Aff. of Patricia Humbert.) An additional problem indicated by the affidavits involves repeated calls to the same numbers; when an ADAD is unable to deliver a message, it stores the telephone number and attempts to dial it at a later time. Thus, some subscribers have complained of receiving numerous calls over the course of a one- or two-week period. (Aff. of Sharon Holt, ¶ 6; Aff. of Gerald Timian, ¶ 3; Aff. of Patricia Humbert, ¶¶ 4, 5.)

Plaintiff contends that ADAD technology has improved, thus the restrictions imposed by the statute are unreasonable. Plaintiff has offered no evidence, however, that such technology is readily available. Indeed, less than two years ago, the state supreme court noted that, whereas better technology was available, many people continued to use less expensive ADADs which, for example, did not disengage until the entire message had been played. Casino Marketing, 491 N.W.2d at 889. The state has a substantial interest in policing conduct in the marketplace. See Minn. Stat. § 8.31, subd. 1 (charging the attorney general's office with responsibility for regulating currency exchanges and telephone advertising services, and investigating and punishing unfair discrimination and competition, unlawful trade practices, violations of state antitrust laws, false and fraudulent advertising, and the monopolization of food products). Furthermore, for the same reasons that the state may seek to minimize invasions of residential privacy, the state may also act to protect the integrity of the workplace; an office is no more a public forum than a residence.

In summary, the defendants have offered two justifications for the Minnesota ADAD statute: the protection of privacy and public safety and the prevention of disruption to commerce in the state. The Court concludes that these rationales constitute significant governmental interests.

The Court turns next to consider whether the statute is

narrowly tailored to meet these interests. A time, place or manner regulation is "narrowly tailored" when it is not substantially broader than is necessary to achieve the government's interest. Ward, 491 U.S. at 799, 109 S. Ct. at 2758. The statute focuses on securing the subscriber's consent before a prerecorded message is delivered. The ADAD statute does not prohibit the use of ADADs, nor does it prohibit the use of prerecorded or synthetic voice messages. Rather it addresses the fact that subscribers lack a meaningful way to avoid such messages without first being subjected to them. The Court concludes that the statute imposes a narrow restriction on the use of a particular form of technology to disseminate speech in a nonpublic forum.

Finally, the Court addresses whether the ADAD statute leaves open ample alternative means of communication. Canvassing, handbilling, and using live persons -- whether paid or volunteer -- to place calls manually or by autodialers, are plainly not prohibited by the amended statute; all are available means of communication. Van Bergen does not dispute that these other forms of communication are available; rather, he contends that he cannot afford to use live operators or alternative automatic dialing technology which connects the caller to a live operator. The Constitution does not guarantee a person the most efficient means of communication; it is appropriate for the government to balance the efficiency with which speech is disseminated against the public's interest in privacy and public safety. See Casino

Marketing, 491 N.W.2d at 890.

Accordingly, the Minnesota ADAD statute does not violate the plaintiff's First Amendment rights as those are incorporated through the Fourteenth Amendment.

B. Violation of the Equal Protection Clause

Van Bergen also contends that the ADAD statute violates the Equal Protection Clause of the Fourteenth Amendment. He argues that the three exclusions from the consent requirement in Minn. Stat. § 325E.27 discriminate impermissibly against him. The three groups who need not obtain consent to deliver a prerecorded or synthetic voice message by an ADAD are (1) school districts, calling students, parents, or employees, (2) callers who have a current business or personal relationship with the subscriber, and (3) employers calling employees to advise them of work schedules. Id.

The Equal Protection Clause requires the government to treat "all similarly situated persons" alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985). As the state supreme court has observed, the three groups excluded from the consent requirement all have a pre-existing relationship with the subscriber. Van Bergen is not similarly situated to these exempted groups; his purpose in using ADAD technology is to reach unknown persons with whom he has no business or personal relationship to encourage them to vote and

to introduce himself as a candidate.[16] The Court concludes that the statute does not infringe upon plaintiff's right to equal protection under the law.[17]

Conclusion

Upon all the files, records and proceedings herein -- including the Court's foregoing analysis of the constitutionality of the Minnesota ADAD statute, on its face and as applied, under the First and Fourteenth Amendment, the Equal Protection Clause, and the Supremacy Clause -- the Court concludes that plaintiff is not entitled to declaratory or injunctive relief. Accordingly, **IT IS ORDERED** that plaintiff's Verified Complaint is **DISMISSED WITH PREJUDICE.**

Date: July 18, 1994.

RICHARD H. KYLE
United States District Judge

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[16] Van Bergen contends that the "preexisting business or personal relationship" exception is broad enough to reach incumbent politicians such that incumbents could uses ADAD technology to deliver prerecorded messages whereas other candidates could not. The Court finds no basis for such a broad reading of the term "business or personal relationship" in either the statute or the state supreme court's opinion in Casino Marketing.

[17] Even if the exceptions to section 325E.27 did violate the Equal Protection Clause, the Court notes that the Minnesota Legislature has provided that a statute is severable unless otherwise provided. Minn. Stat. § 645. 20. Although a federal court may not place a limiting construction on a state statute, the Court notes that a basis for a saving construction exists.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard T. Van Bergen,

Plaintiff,

vs.

Civil No. 3-94-731
ORDER

State of Minnesota, Hubert H. Humphrey III, in his capacity as Attorney General of the State of Minnesota,

Defendants.

Daryl J. Bergmann, Business Legal Services, Bloomington, Minnesota, for plaintiff.

James P. Jacobson and Peter Ackerberg, Minnesota Attorney General's Office, Saint Paul, Minnesota, for defendants.

Before the Court is defendants' Motion to Quash Trial Subpoenas of two state officials:

(1) Attorney General Hubert H. Humphrey III; and

(2) Curt Loewe, Manager of the Consumer Services Division of the Attorney General's Office.

Pursuant to Rule 45(c) of the Federal Rules of Civil Procedure, the Court may, on a timely motion, quash or modify the subpoena if it "subjects a person to an undue burden." F.R.Civ.P. 45(c)(3)(C)(iv).

At the hearing on defendants' motion, held July 12, 1994 at 9:30, defendants withdrew the affidavit of Chris Loewe and offered in its place the affidavits of two other members of the Attorney General's staff. The parties agree, and the Court finds, that the subpoena of Chris Loewe may be quashed as moot.

With respect to the subpoena of Attorney General Humphrey, based upon the representations made by plaintiff's counsel on the record as to the scope of plaintiff's planned cross examination, the Court concludes that his testimony is not necessary to a determination of the facial constitutionality of the challenged state statute. See Ludlow Corp. v. DeSmedt, 249 F. Supp. 496, 502 (D.C.N.Y. 1966) (subpoena meets requirements for enforcement if information sought is reasonably relevant to ultimate inquiry), aff'd 366 F.2d 464 (196), cert. denied 385 U.S. 974, 87 S. Ct. 513 (1967); Moffett v. Arabian Am. Oil Co., 8 F.R.D. 566, 568 (D.C.N.Y. 1948) (witness will not be required to appear at trial unless testimony is reasonably necessary to claim); see also United States v. O'Brien, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682 (1968) (allegedly illicit motive not grounds for striking down otherwise constitutional statute).

Accordingly, **IT IS ORDERED** that defendant's Motion to Quash Subpoenas is **GRANTED.**

Date: July 12, 1994

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Richard T. Van Bergen

Case No. Civil 3-94-731

v.

JUDGMENT IN A CIVIL CASE

The State of Minnesota, Hubert H. Humphrey III, in his capacity as Attorney General of the State of Minnesota

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( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's verified complaint is dismissed with prejudice.

DATE: July 18, 1994.

FRANCIS E. DOSAL, CLERK

Patricia J. Sabin, Deputy Clerk

A true copy in 1 sheet(s)
of the record in my custody.
CERTIFIED 7/16, 1994
Francis E. Dosal, Clerk
BY: Deputy Clerk